[redacted]

(33,576)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 267

ITHACA TRUST COMPANY, SOLE SURVIVING EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF EDWIN C. STEWART, DECEASED, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Petition for writ of certiorari	a	1
Record from Court of Claims	1	5
Petition	1	5
Exhibit "A"—Will	12	13
Exhibit "B"—Letters testamentary	17	18
General traverse	18	18
Argument and submission	18	18
Special findings of fact	19	19
Conclusion of law	21	22
Opinion, Graham, J	22	22
Judgment	24	25
Proceedings after entry of judgment	24	26
Clerk's certificate (omitted in printing)	25	
Order allowing certiorari		27

[fol. 1]

IN THE SUPREME COURT OF THE UNITED STATES

ITHACA TRUST COMPANY, Sole Surviving Executor and Trustee under the Last Will and Testament of Edwin C. Stewart, Deceased, Petitioner and Plaintiff,

vs.

THE UNITED STATES, Defendant

PETITION FOR WRIT OF CERTIORARI

The decision of the Court of Claims herein was rendered the 20th day of February, 1928. Plaintiff's motion for a new trial was overruled by said Court on the 28th day of May, 1928.

Your petitioner respectfully shows and petitions this Court as follows:

1. At the time of the commencement of this suit your petitioner was and still is the Sole Surviving Executor and Trustee under the Last Will and Testament of Edwin C. Stewart, deceased, being a corporation organized and existing under the laws of the State of New York.

2. This suit was brought by your petitioner to recover Federal Estate Taxes erroneously and illegally assessed against and collected from it as Executor of the Estate of said Edwin C. Stewart, deceased.

[fol. 2] 3. The decedent, Edwin C. Stewart, died a resident of Ithaca, in the State of New York, and by his Will made certain bequests to his trustee in trust exclusively for charitable, religious and public purposes. The Commissioner, however, refused to allow the Executor to make any deduction for such bequests, and upon review and audit of the Federal Estate Tax Return, assessed and collected additional Estate taxes from your petitioner because of the inclusion in the net estate of the value of such bequests.

The deductibility of charitable, religious, etc., bequests is governed by the Revenue Act of 1918, (said decedent having died June 15, 1921), and said Act allowed as deductions:

"The amount of all bequests, legacies, devises, or gifts * * * to any State * * * any subdivision thereof * * * for exclusively public purposes * * * or to a trustee or trustees exclusively for such religious, scientific, charitable, literary or educational purposes. * * * (Sec. 403 (a) (3) Rev. Act of 1918). * * * The Executor shall also, at such time * * * as may be prescribed by regulations made pursuant to law, file * * * a return * * * setting forth (a) the value of the gross estate of the decedent at the time of his death * * *; (b) the deductions allowed in Section 403; (c) the value of the net estate of decedent, as defined in Section 403; * * *." (Sec. 404 id).

Article 77 of Regulations 37 prescribed:

"A return on Form 706 is required * * *. It must be filed within one year after the date of death unless an extension is had * * *."

Under the construction given the above by the Commis- [fol. 3] sioner, the Executor was not permitted to deduct the amount of the charitable and like bequests in testator's Will. The executor paid the additional estate tax and brought this suit to recover the amount by which the estate tax would be reduced had deductions of such bequests been allowed.

4. The charitable and like bequests contained in testator's Will were as follows:

The testator bequeathed his entire residuary estate of $347,244.51 to the use of his wife for life with the added provision, "I also authorize my wife, Annie L. Stewart, to use any additional sum necessary to suitably maintain her in as much comfort as she now enjoys." Upon the death of the wife the entire residuum (with the exception of $35,000) was to fall to trustees for the exclusive use of charitable and like institutions enumerated in Section 403 of the Act of 1918, supra.

Decedent's widow died December 12, 1921, less than six months after the death of decedent, having received and been credited with $10,110.04 income from the residuum, and the amount to be paid to charitable and like institu-

tions was definitely ascertainable prior to the date of the computation of the Federal Estate Tax. The income from the estate was at decedent's death, and at all times during [fol. 4] the life of the widow in excess of the sum necessary, in the absence of unusual circumstances, to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of the testator.

(Finding XIII.)

5. The executor contended, in the alternative:

(a) That the full amount paid to charitable and like institutions under the Will was deductible, as such amount was definitely ascertained within the period prescribed by the statute and the regulation for the ascertainment of the amount of charitable and like bequests and other deductions.

(b) That the full residuum (less $35,000) was deductible, less the value of the widow's life estate: (1) The actual value as same was ascertainable prior to date of computation of the tax; or (2) the arbitrary value as derived by the mortuary tables prescribed by the Treasury Department of the United States.

6. The Court of Claims refused to allow the deductions of said bequests, giving as its reason for so holding:

"* * * Without entering into a discussion of what limitations there were, if any, on expenditure by the life tenant 'to suitably maintain her in as much comfort as she now enjoys,' it is evident that the failure of investments, the diminution of income, the high cost of living, and the changing ideas of what constitutes comfort might well absorb a good part, and possibly all, of the principal sum and leave no balance for charity, and that a contingency permeates the gifts to charity which may prevent any of [fol. 5] them from ever going into possession and enjoyment * * *."

7. Your Petitioner respectfully submits that: (a) the bequests gave to charities, etc. a vested estate in testator's residuum; that the statute allowed such bequests to be treated as deductions; and that the death of the life tenant made the value of such bequests (the amount of such deduction) definitely ascertainable within the time prescribed

by the Statute and the regulation, for the ascertainment of such and other deductions; (b) the bequests gave to charities vested remainders subject to divesture upon a possibility too remote to properly be given the effect of depriving such bequests of any substantial value. And for estate tax purposes that value was ascertainable and allowable.

8. Your petitioner submits that the question of the proper construction of the Revenue Act of 1918 is one of public importance; that the Circuit Court of Appeals for the Fifth Circuit has decided one of the questions herein involved contra to the decision of the Court of Claims in the instant case; and the question should be passed upon by this Court.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Claims of the United States, commanding the said Court to certify and send to [fol. 6] this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court of Claims of the United States in the case entitled Ithaca Trust Company, Sole Surviving Executor and Trustee Under the Last Will and Testament of Edwin C. Stewart, deceased, vs. The United States, No. F-82, to the end that said case may be reviewed and determined by this Court as provided in the Judicial Code, or that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

Ithaca Trust Company, By R. V. H. Lyon, Simon Lyon, Attorneys for said Petitioner.

[fol. 1] IN THE UNITED STATES COURT OF CLAIMS

No. F-82

ITHACA TRUST COMPANY, Sole Surviving Executor and Trustee Under the Last Will and Testament of Edwin C. Stewart, Deceased, Plaintiff,

vs.

THE UNITED STATES, Defendant

I. PETITION—Filed Feb. 26, 1926

To the Honorable, the Chief Justice and the Judges of the United States Court of Claims:

Your Petitioner, the Ithaca Trust Company, as sole surviving executor and trustee under the Last Will and testament of Edwin C. Stewart, deceased, respectfully represents:

[fol. 2] I

That it is a corporation duly organized and existing under the laws of the State of New York.

II

That on the 24th day of February, 1919, the President of the United States approved an act entitled "An Act to provide revenue, and for other purposes" (40 Stat. L. 1057), Sections 401, and 402 of Title IV of said Act provided for the assessment and collection of certain "Estate Taxes" upon and from the estates of resident decedents. (Amendments by the Revenue Act of 1921, 42 Stat. L. 227; and by the Revenue Act of 1924, — Stat. L. 253, are not material to the issues of this case.)

The material portion of said Section 401 is as follows:

"Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the

net estate (determined as provided in Section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States;

"1 per centum of the amount of the net estate not in excess of $50,000;

"2 per centum of the amount by which the net estate exceeds $50,000 and does not exceed $150,000;

"3 per centum of the amount by which the net estate exceeds $150,000 and does not exceed $250,000;

* * * * * * *

[fol. 3] "Sec. 403. That for the purpose of the tax the value of the net estate shall be determined—(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * * * *

(There is no dispute as to deductions provided in Subdivisions (1) and (2).)

"(3). The amount of all bequests, legacies, devices, or gifts, to or for the use of the United States, any State, Territory, any subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of estates of all decedents who have died since December 31, 1917, and

"(4). An exemption of $50,000."

III

That heretofore, to wit, on the 9th day of June, 1922, Edwin C. Stewart, then in life, being a citizen of the United States, and a resident of the City of Ithaca, State of New York, duly executed and acknowledged his last will and testament, a certified copy of same being filed herewith

marked "Claimant's Exhibit A" and prayed to be read and considered as a part of this petition. That the material portions of said last will and testament are the twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth, paragraphs thereof, which are in words and figures as follows:

[fol. 4] "Twelfth. I give unto my beloved wife, Annie L. Stewart, of Ithaca, New York, the use for her natural life, of all the rest, residue and remainder of my property, real, personal and mixed of which I may die seized, with full authority to sell and dispose of any real estate of which I may die seized, for such figures as she may, in her judgment, deem for the best interest of my estate. I also authorize my wife, Annie L. Stewart, to use any additional sum from the principal of my estate that may be necessary to suitably maintain her in as much comfort as she now enjoys. I request my wife, Annie L. Stewart, from the said income of my estate, to give annually, a sum sufficient in her judgment for the maintenance of my cousin, Grace L. Ely, of West Allenhurst, New Jersey.

"Thirteenth. At the death of my wife, Annie L. Stewart, of Ithaca, New York, from the balance of my estate, I direct my Executors, hereinafter named, to pay unto the trustees of East Lawn Cemetery, the sum of Ten thousand dollars ($10,000).

"Fourteenth. I give unto the Ithaca Trust Company of Ithaca, New York, from the funds in the hands of my Executors, hereinafter named, the sum of Twenty-five thousand dollars ($25,000). In trust nevertheless, for the following uses and purposes: To invest and re-invest as it deems for the best interest of this Trust, the interest to be paid semi-annually to the Trustees of the East Lawn Cemetery of Ithaca, New York, said interest to be used by the said Trustees or their successors:

"I. For the good and suitable upkeep of my lot in said Cemetery.

"II. The balance to be expended by them for the upkeep of the said Cemetery.

"Fifteenth. From the balance of my estate at the death of my wife, I give unto the Union Benevolent Society, of [fol. 5] Ithaca, New York, Seventy-five thousand dollars

($75,000), in trust nevertheless, for the following uses and purposes: To establish The Stewart Memorial Fund, as an Endowment Fund, the income from which shall be used for the maintenance of "The Home," at Ithaca, New York.

"Sixteenth. From the balance of my estate at the death of my wife, I give unto the Trustees of the First Presbyterian Church, of Ithaca, New York, the sum of Twenty-five thousand Dollars ($25,000), in trust nevertheless, for the following uses and purposes: To invest and re-invest as they deem for the best interest of this Trust, the income therefrom to be used for the benefit of the First Presbyterian Church, of Ithaca, New York; this Fund to be in memory or my mother, A. Louisa Stewart.

"Seventeenth. From the balance of my estate at the death of my wife, I give unto the Board of Trustees of the Ithaca Hospital, of Ithaca, New York, the sum of One hundred thousand Dollars ($100,000), in trust nevertheless for the following uses and purposes: To invest and re-invest as it deems for the best interest of this Fund, the interest to be used for the maintenance of the Ithaca City Hospital, the principal to be maintained as the Stewart Endowment Fund.

"Eighteenth. From the balance of my estate at the death of my wife, I give unto the Ithaca Trust Company, of Ithaca, New York, in trust nevertheless, all the rest, residue and remainder of my estate, to invest and re-invest as it deems for the best interest of this Trust, the interest to be paid semi-annually for a period of ten years, for the improvement of Renwick Park, at Ithaca, New York, and at the end of said ten years, the balance of my estate not hereinbefore specifically expended or otherwise trusteed, I [fol. 6] direct to be expended for the permanent improvement of said Renwick Park, under the direction of the Directors of the Ithaca Trust Company, as they in their judgment shall deem best."

IV

That the said Edwin C. Stewart departed this life on, to wit, the 15th day of June, 1921, without having revoked or modified the aforementioned last will and testament, and the same was duly admitted to probate and record in the

Surrogate's Court of Tompkins County, New York, as and for the last will and testament of the said Edwin C. Stewart. That your petitioner duly qualified as executor and trustee thereunder; and on the 9th day of August, 1921, letters testamentary on the estate of the said Edwin C. Stewart were duly granted unto Annie L. Stewart, his widow, and your petitioner; as will more fully appear by reference to a certificate of the Surrogate's Court of Tompkins County, New York, herewith filed, marked "Claimant's Exhibit B," and prayed to be read and considered a part of this petition.

That the said widow Annie L. Stewart, departed this life on, to wit, the 12th day of December, 1921, approximately six months after the date of death of decedent, leaving your petitioner the sole surviving executor and trustee of the estate of the said Edwin C. Stewart, deceased.

That your petitioner is still executor and trustee as aforesaid, its authority as such never having been modified or revoked; as will more fully appear by reference to the Certificate of the Surrogate's Court of Tompkins County, New York, above mentioned.

That your petitioner has strictly complied with all the [fol. 7] terms of and directions contained in said last will and testament.

V

That your petitioner, on or about August 9, 1921, as executor of the estate of the said Edwin C. Stewart, deceased, in compliance with the provisions of the Revenue Act of 1918, *supra*, duly made and filed an estate tax return in writing, with the Collector of Internal Revenue of the 21st District of the State of New York, and paid to said Collector, as such executor, $1,020.64 as and for estate taxes due from said estate.

That on or about December 24, 1924, the then Collector of Internal Revenue for the 21st District of the State of New York, acting for and on behalf of the United States, and assuming to act as such under the provisions of the Act of Congress approved February 24, 1919, as amended, collected, over its protest, from your petitioner as executor as aforesaid, the further sums of $11,498.82 and $735.82 (interest), claiming the same to be lawfully due under said Act. Making the total sum collected from your petitioner,

as aforesaid, Thirteen Thousand Two Hundred Seventy-three Dollars and Twenty-eight Cents ($13,273.28).

VI

That on or about the 10th day of April, 1925, your petitioner filed an application in the Treasury Department, praying for and demanding the refundment of all of said moneys, collected from it as aforesaid.

Although said application was in all respects complete, regular and in accordance with the law and regulations, was accompanied by all the necessary evidence and proof of facts, which facts were not traversed or denied by [fol. 8] the Commissioner of Internal Revenue nor by any other representative of the United States, nevertheless, on, to wit, the 17th day of July, 1925, the Secretary of the Treasury of the United States, rejected and denied said application (as shown by the records of the Office of the Hon. Commissioner of Internal Revenue, Treasury Department, which are prayed to be read and considered a part of this petition), and has continuously declined and now declines to pay to your petitioner the moneys asked and demanded by the said application.

VII

That the said Annie L. Stewart, widow of said decedent, was, on the date of death of the said testator, sixty-one (61) years of age; and that the said widow departed this life on, to wit, the 12th day of December 1921, approximately six months after the date of death of the said testator.

That for many years prior to the death of said Edwin C. Stewart, testator, he and his widow, Annie L. Stewart, lived in Ithaca, New York, in a simple and unpretentious style; and that the income from the estate of the said testator was, at his death, and during the life of the widow, in excess of the sum necessary to "suitably maintain her in as much comfort as she now enjoys."

VIII

That the aforementioned Collector of Internal Revenue and the Hon. Commissioner of Internal Revenue, in as-

sessing and collecting the moneys from your petitioner as aforesaid, held that estate taxes were assessable and collectible upon the entire estate of said Edwin C. Stewart, without the allowance of any deduction whatsoever of charitable, educational or public bequests (set forth above), [fol. 9] as provided by Section 403 (a) (3), supra.

In figures the statement of the Honorable Commissioner of Internal Revenue is as follows:

Gross estate determined including charitable, public and similar bequests returned $347,244 51		$507,557 12
Deductions (other than under 403 (a) (3))		82,070 73
Total net estate determined		$425,486 39
Tax determined	$12,519 46	
Interest	753 82	
Total paid	$13,273 28	

IX

That your petitioner is advised by counsel and therefore avers that the entire tax paid is refundable for the reason that the entire estate was paid to charitable, public, and educational, etc., institutions, the said widow having died within one year from the date of death of testator—that is, prior to the expiration of the legal period of administration.

X

Your petitioner is advised by counsel, and therefore avers, that if the entire tax be not refundable, then, in the computation of estate tax legally due, it was and is entitled, under Section 403 (a) (3) of the Revenue Act of 1918, supra, to the deduction of the value as of the date of death of testator, of the remainders bequeathed to the charitable, public, religious, and similar institutions; and that a proper computation of the tax would be as follows:

[fol. 10] Total Gross Estate			$507,557 12
Deductions 401 (a) (1) and 401 (a) (4)		$82,070 73	
Value of property to widow for life remainder to charitable, etc., institutions	$347,244 51		
Less life estate to widow (61 yrs. @ 4%)	126,329 64		
Value of Remainders to charitable etc., institutions		$220,914 87	
Total deductions			$302,985 60
Net estate taxable			$204,571 52
Tax on above		$4,137 15	
Less $1,026.64 paid with return, Balance $3,116.51 Interest on $3,116.51 to December 14, 1924		204 95	
Total tax as per above		$4,342 10	
Tax and Interest paid		13,273 28	
Refundable with interest from date of payment		$8,931 18	

XI

No action upon this claim, other than that hereinbefore set forth, has been taken before the Congress or any of the departments of the United States Government.

XII

That your petitioner has at all times borne true allegiance to the Government of the United States, and it has not in any way abetted or given encouragement to rebellion against the said Government.

Your petitioner avers that there is justly due and owing to it from the United States, on account of the matters

herein set forth, the sum of thirteen thousand two hundred and seventy-three dollars and twenty-eight cents ($13,273.28), after deducting all just setoffs or demands on the part of the United States, together with interest at the rate of six (6) per centum per annum from the date of the pay-[fol. 11] ments of the alleged taxes; that your petitioner is the sole owner of the claim herein sued upon, and no assignment or transfer of the said claim or any part thereof, or any interest therein, has been made.

Wherefore, your petitioner prays judgment against the United States in the sum of thirteen thousand two hundred and seventy-three dollars and twenty-eight cents ($13,273.28), together with interest at the rate of six (6) per centum per annum from the respective dates of payment of the alleged taxes.

Ithaca Trust Company, by Lyon & Lyon, Attorneys for Plaintiff.

City of Washington,
District of Columbia, ss:

Personally appeared before me, a Notary Public, in and for the District of Columbia, R. B. H. Lyon, who being duly sworn according to law, deposes and says, that he is a member of the firm of Lyon & Lyon, and that he is duly authorized to make oath in this cause by virtue of power of attorney herewith filed, and that he has read and understands the foregoing petition, and that the facts therein set forth are true in substance and fact as he is informed and believes.

R. B. H. Lyon.

Subscribed and sworn to before me, a Notary Public, this 26th day of February, A. D. 1926. George W. Smith, Notary Public, D. C.

[fol. 12] Claimant's Exhibit A to Petition

State of New York,
Tompkins County,
Surrogate's Office, ss:

I do hereby Certify, that I have compared the annexed copy of the last Will and Testament of Edwin C. Stewart,

deceased, with the original record thereof in this office, and that the same is a correct transcript therefrom, and of the whole of said original Record. Said will was probated on the 9th day of August, 1921.

In Witness Whereof, I have hereunto set my hand and caused the Official Seal of the Surrogate's Court of Tompkins County to be hereunto affixed, at Ithaca, in said County, this 18th day of January, in the year 1926.

D. M. Gillespie, Clerk of Surrogate's Court. (Seal.)

Last Will and Testament

I, Edwin C. Stewart, of the City of Ithaca, in the County of Tompkins and State of New York, being of sound mind and memory, do make, publish and declare this my last Will and Testament, in manner following, that is to say:

First. I direct the payment of all my just debts and funeral expenses.

Second. I give unto my beloved wife, Annie L. Stewart, formerly Annie L. Post, of Ithaca, New York, the sum of Fifty thousand Dollars ($50,000); also my home at 125-127 East Buffalo Street, Ithaca, New York, my cottage and all other property at McKinney's and my boat-house property on Westport Street, Ithaca, New York, together with all the furniture, furnishings and all equipment therein severally contained, including my automobiles and motor boat.

Third. I give unto Ford D. Whiting, of Ithaca, New York, fifty (50) shares of stock of D. B. Stewart & Co., Inc., par value of one hundred dollars ($100) each.

[fol. 13] Fourth. I give unto Lewis C. Perry, of Ithaca, New York, fifty (50) shares of stock of D. B. Stewart & Co., Inc., par value of one hundred dollars ($100) each.

Fifth. I give unto Gardiner M. Rogers, of Ithaca, New York, fifty (50) shares of stock of D. B. Stewart & Co., Inc., par value of one hundred dollars ($100) each.

Sixth. I give unto my uncle, Olin L. Stewart, of Ithaca, New York, one hundred (100) shares of stock of D. B. Stewart & Co., Inc., par value of one hundred dollars ($100) each.

Seventh. I give unto my cousin, Minnie C. Gray, of Brooklyn, New York, the sum of Five Thousand Dollars, ($5,000).

Eighth. I give unto my cousin, J. Livingston Ely, of El Paso, Texas, the sum of one thousand dollars, ($1,000).

Ninth. I give unto my friend, Benjamin F. Milks, of Ithaca, New York, the sum of one thousand dollars ($1,000).

Tenth. I give unto every person, who is either in my employ or that of D. B. Stewart & Co., Inc., at the date of my death and who shall have been in the regular employ of myself or D. B. Stewart & Co., Inc., or its predecessor, D. B. Stewart & Company, for a total period of ten (10) years, the sum of five Hundred Dollars ($500) except that there is excluded from the gift provided for in this paragraph, each person hereinbefore specifically or individually provided for in this Will.

Eleventh. I give unto every other person, who is either in my employ or that of D. B. Stewart & Co., Inc., at the date of my death, and who shall have been in the regular employ of myself or D. B. Stewart & Co., Inc., for a period of one year, the sum of One Hundred Dollars ($100) each, except that there is excluded from the gift provided for in this paragraph, each person hereinbefore specifically or individually provided for in this Will.

[fol. 14] Twelfth. I give unto my beloved wife, Annie L. Stewart, of Ithaca, New York, the use for her natural life of all the rest, residue and remainder of my property, real, personal and mixed of which I may die seized, with full authority to sell and dispose of any real estate of which I may die seized, for such figures as she may, in her judgment, deem for the best interest of my estate. I also authorize my wife, Annie L. Stewart, to use any additional sum from the principal of my estate that may be necessary to suitably maintain her in as much comfort as she now enjoys. I request my wife, Annie L. Stewart, from the said income of my estate, to give annually a sum sufficient in her judgment for the maintenance of my cousin, Grace L. Ely, of West Allenhurst, New Jersey.

Thirteenth. At the death of my wife, Annie L. Stewart, of Ithaca, New York, from the balance of my estate, I direct my Executors, hereinafter named, to pay unto the trustees of East Lawn Cemetery, the sum of Ten Thousand Dollars ($10,000).

Fourteenth. I give unto the Ithaca Trust Company, of Ithaca, New York, from the funds in the hands of my

Executor hereinafter named, the sum of Twenty-five thousand dollars ($25,000) in trust nevertheless, for the following uses and purposes: To invest and re-invest as it deems for the best interest of this Trust, the interest to be paid semi-annually to the Trustees of the East Lawn Cemetery of Ithaca, New York, said interest to be used by the said Trustees or their successors.

I. For the good and suitable upkeep of my lot in said Cemetery.

II. The balance to be expended by them for the upkeep of the said Cemetery.

Fifteenth. From the balance of my estate at the death of my wife, I give unto the Union Benevolent Society, of Ithaca, New York, seventy-five thousand dollars ($75,000). In trust nevertheless, for the following uses and purposes: To establish The Stewart Memorial Fund, as an Endow-[fol. 15] ment Fund, the income from which shall be used for the maintenance of "The Home," at Ithaca, New York.

Sixteenth. From the balance of my estate at the death of my wife, I give unto the Trustees of the First Presbyterian Church, of Ithaca, New York, the sum of Twenty-five thousand dollars (25,000), in trust nevertheless, for the following uses and purposes: To invest and re-invest as they deem for the best interest of this Trust, the income therefrom to be used for the benefit of the First Presbyterian Church, of Ithaca, New York; this fund to be in memory of my mother, A. Louisa Stewart.

Seventeenth. From the balance of my estate at the death of my wife, I give unto the Board of Trustees of the Ithaca City Hospital, of Ithaca, New York, the sum of One hundred thousand dollars ($100,000), in trust nevertheless for the following uses and purposes: To invest and re-invest as it deems for the best interest of this Fund, the interest to be used for the maintenance of the Ithaca City Hospital, the principal to be maintained as the Stewart Endowment Fund.

Eighteenth. From the balance of my estate at the death of my wife, I give unto the Ithaca Trust Company, of Ithaca, New York, in trust nevertheless, all the rest, residue and remainder of my estate, to invest and re-invest as it deems for the best interest of this Trust, the interest to be paid semi-annually for a period of ten years, for the

improvement of Renwick Park, at Ithaca, New York, and at the end of said ten years the balance of my estate not hereinbefore specifically expended or otherwise trusteed, I direct to be expended for the permanent improvement of said Renwick Park, under the direction of the Directors of the Ithaca Trust Company, as they in their judgment shall deem best.

Nineteenth. I authorize my Executors and Trustee herein designated, to act without Bond.

Twentieth. I direct my Executors that it is my wish and [fol. 16] will that my estate pay all taxes and that each and every gift herein made shall be net to the devisee.

Lastly, I hereby appoint my wife, Annie L. Stewart of Ithaca, New York, and the Ithaca Trust Company of Ithaca, New York, Executors of this my last Will and Testament; and hereby appoint the Ithaca Trust Company, of Ithaca, New York, to be Trustee of each and every Trust created in this Will for which a Trustee is not hereinbefore named.

In witness whereof, I have hereunto subscribed my name the 9th day of June, in the year One thousand nine hundred and twenty-one.

Edwin C. Stewart. (L. S.)

We, whose names are hereto subscribed, do certify that on the 9th day of June, 1921, Edwin C. Stewart, the testator above named, subscribed his name to this instrument in our presence and in the presence of each of us, and at the same time, in our presence and hearing, declared the same to be his last will and testament, and requested us and each of us, to sign our names thereto, as witnesses to the execution thereof, which we hereby do in the presence of the testator and of each other, on the day of the date of the last Will, and write opposite our names our respective place of residence.

Geo. S. Tarbell, residing at Ithaca, N. Y. Arthur D. White, residing at Ithaca, N. Y.

[fol. 17] CLAIMANT'S EXHIBIT B TO PETITION

The People of the State of New York to all to whom these presents shall come or may concern:

Know ye, that at Ithaca, in the County of Tompkins, State of New York, on the 9th day of August, 1921, Letters Testamentary, upon the Last Will and Testament of Edwin C. Stewart, late of the city of Ithaca, in said County, deceased, were duly granted and issued by the Surrogate's Court of the County of Tompkins, to Annie L. Stewart of the City of Ithaca, N. Y., Ithaca Trust Company of the City of Ithaca, N. Y. Executors in said Will named and that the same are still in force and unrevoked as to Ithaca Trust Company, who is the sole surviving executor of said estate.

In testimony whereof, We have caused the seal of our said Surrogate's Court to be hereunto affixed. Witness, Hon. Willard M. Kent, Surrogate of our said County, at Ithaca, this 18th day of January, A. D., 1926.

D. M. Gillespie, Clerk of the Surrogate's Court.
(Seal.)

[fol. 18] II. GENERAL TRAVERSE—Filed Apr. 27, 1926

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.
F. K. D.

III. ARGUMENT AND SUBMISSION

On January 25, 1928, this case was argued and submitted on merits by Mr. Alex. F. Prescott, Jr., for plaintiff, and by Mr. J. H. Sheppard, for the defendant.

IV

[fol. 19] **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Graham, J.**—Filed Feb. 20, 1928.

This case having been heard by the Court of Claims upon a stipulation of facts signed on behalf of plaintiff by its attorneys Lyon & Lyon and on behalf of defendant by Assistant Attorney General Herman J. Galloway, the court adopts said stipulation as its

Special Findings of Fact

I

The plaintiff, the Ithaca Trust Company, is a corporation duly organized and existing under the laws of the State of New York, and is fully empowered to administer estates and execute trusts.

II

On June 9, 1921, one Edwin C. Stewart, then in life, being a citizen of the United States and a resident of the city of Ithaca, State of New York, duly executed and acknowledged his last will and testament, a copy of which, marked "Exhibit A," is attached to the petition and made a part hereof by reference.

III

The said Edwin C. Stewart departed this life on June 15, 1921, without having revoked or modified the aforementioned last will and testament, and the same was duly admitted to probate and record in the surrogate's court of Tompkins County, New York, as and for the last will and testament of the said Edwin C. Stewart, deceased. The plaintiff duly qualified as executor and trustee thereunder, and on August 9, 1921, letters testamentary on the estate of the said Edwin C. Stewart were duly granted unto Annie L. Stewart, his widow, and the plaintiff. The said widow, Annie L. Stewart, departed this life on December 12, 1921, leaving the plaintiff the sole surviving executor and trustee

of the estate of the said Edwin C. Stewart, deceased. The plaintiff is still executor and trustee as aforesaid, its authority as such never having been modified or revoked.

IV

The said widow, Annie L. Stewart, was born on May 27, 1860.

[fol. 20] V

On June 14, 1922, the plaintiff, as executor of the estate of the said Edwin C. Stewart, deceased, made and filed an estate tax return, in writing, with the collector of internal revenue for the 21st district of the State of New York, and paid to said collector an estate tax of $1,020.64.

VI

On April 29, 1924, the plaintiff filed a claim for refund of $32.35 of the tax of $1,020.64 paid on June 14, 1922, as set forth above.

VII

On March 27, 1924, on review and audit, the Commissioner of Internal Revenue found due an additional estate tax in the sum of $11,911.42.

VIII

On April 24, 1924, the plaintiff filed a claim for abatement of the additional tax of $11,911.42 set forth above in Finding VII.

IX

On December 8, 1924, the Commissioner of Internal Revenue rejected said claim for refund of $32.35, and allowed said claim for abatement to the extent of $412.60.

X

On December 24, 1924, plaintiff paid an additional estate tax of $11,498.82, with interest in the sum of $753.82.

XI

On April 13, 1925, plaintiff filed a claim for refund of $12,252.64, which was rejected by the Commissioner of Internal Revenue on July 17, 1925.

XII

The total amount actually paid and accrued to the widow, Annie L. Stewart, and her estate, as legatee under the last will and testament of Edwin C. Stewart, deceased, was as follows:

Specific bequest, $50,000.00.

Income from decedent's death to widow's death, $10,110.04.

XIII

For many years prior to the death of said Edwin C. Stewart, he and his widow, Annie L. Stewart, lived in Ithaca, New York, in a simple and unpretentious style, spending each year less than the income produced by the estate of the said testator; and the income from the estate [fol. 21] of said testator was, at his death, and during the life of the widow, in excess of the sum necessary to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of said testator. After the payment of debts and the specific legacies, the estate produced an income in excess of the sum necessary, in the absence of unusual circumstances, to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of the said testator.

XIV

The value of the entire residuum of the estate was at date of said testator's death $347,244.51. The value of a life estate in $347,244.51 to a person sixty-one years of age (as shown by the mortuary tables prescribed by the Treasury Department of the United States) is $126,329.64.

XV

The following institutions named as legatees in the said last will and testament of Edwin C. Stewart, deceased, are

either political subdivisions of a State or corporations organized and operated for religious, charitable, scientific, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any stockholder or individual, or trustees for such purposes, namely:

Union Benevolent Society of Ithaca, New York.

"The Home" of Ithaca, New York.

Trustees of the First Presbyterian Church, of Ithaca, New York.

First Presbyterian Church, of Ithaca, New York.

Board of trustees of the Ithaca City Hospital, of Ithaca, N. Y.

Ithaca City Hospital, of Ithaca, New York.

Ithaca Trust Co., as trustee for Renwick Park, at Ithaca, New York.

Renwick Park, at Ithaca, New York.

XVI

No action upon this claim, other than that herein set forth, has been taken before the Congress or any of the departments of the United States Government. The plaintiff is sole owner of the claim sued upon, and no assignment or transfer of the same, or any part thereof, or any interest therein, has been made. The plaintiff has at all times borne true allegiance to the Government of the United States, and it has not in any way abetted or given encouragement to rebellion against the said Government.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition should be, and it is, dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record in this cause, the amount thereof to be ascertained by the clerk and collected by him.

[fol. 22] Opinion

Graham, Judge, delivered the opinion of the court:

This is an action to recover a sum paid as an additional estate tax on the estate of Edwin C. Stewart. It involves

the question whether by the terms of the will of said Stewart a residuary estate to charitable purposes following a life estate should be taxed as part of the net estate of the decedent at his death. The provision of the will involved is as follows:

"Twelth. I give unto my beloved wife, Annie L. Stewart, of Ithaca, New York, the use for her natural life of all the rest, residue, and remainder of my property, real, personal, and mixed of which I may die seized, with full authority to sell and dispose of any real estate of which I may die seized, for such figures as she may, in her judgment, deem for the best interest of my estate. I also authorize my wife, Annie L. Stewart, to use any additional sum from the principal of my estate that may be necessary to suitably maintain her in as much comfort as she now enjoys. I request my wife, Annie L. Stewart, from the said income of my estate, to give annually, a sum sufficient in her judgment for the maintenance of my cousin, Grace L. Ely, of West Allenhurst, New Jersey."

The question raised is whether under the will the plaintiff, as executor, was entitled to deduct from the gross estate of decedent at his death the full value of the residuary legacy. The Goverment contended that it could not, but must account for the tax on the same as part of the gross estate, in conformity with the provisions of the applicable statute.[1] It has been held that what was taxed by the

[1] The applicable sections of the revenue act of 1918, 40 Stat. 1096, 1098, are as follows:

"Sec. 401. That (in lieu of the tax imposed by Title II of the revenue act of 1916, as amended, and in lieu of the tax imposed by Title IX of the revenue act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States."

Sec. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident by deducting from the value of the gross estate—

(3) The amount of all bequests, legacies, devises, or gifts to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917.

statute was not the interest to which the legatees and devisees succeeded on the death but the interest which ceased by reason of death. Y. M. C. A. v. Davis, 264 U. S. 47, 50; Edwards v. Slocum, Id. 61. In the case of Mitchell et al. v. United States, 63 C. Cls. 613, it was held that the revenue act applicable here, authorizing deductions from the gross estate of the amount of all bequests or gifts to a trustee, exclusively for religious or charitable purposes, applied only to bequests or gifts intended to take effect "upon the testator's death or upon the happening of an event that will certainly occur," and that if the contingency upon which the bequest was to go to charitable purposes was such that the bequest might never become effective in possession or enjoyment, there was no authority under the statute for a deduction of the amount, or its ascertained value, from the gross estate.

[fol. 23] In the present case it will be seen that the use during her natural life of all of the estate was given to decedent's wife, and authority to sell and dispose of any of the real estate as in her judgment she might deem for the best interest of the estate, and to use "any additional sum from the principal of my estate that may be necessary to suitably maintain her in as much comfort as she now enjoys." The will further provides that "from the balance of my estate at the death of my wife I give" in trust certain named sums for charitable and religious purposes.

It is clear that what is given for charitable and religious purposes is the "balance" of the estate at the death of the life tenant, whatever that "balance" might be. The life tenant had not only the use of the personal property, but the right to dispose of the real estate at her discretion and to use as much of the principal as would enable her to live in the comfort described in the will.

Without entering into a discussion of what limitations there were, if any, on expenditure by the life tenant "to suitably maintain her in as much comfort as she now enjoys," it is evident that the failure of investments, the diminution of the income, the high cost of living, and the changing ideas of what constitutes comfort might well absorb a good part, and possibly all, of the principal sum and leave no balance for charity, and that a contingency permeates the gifts to charity which may prevent any of

them from ever going into possession and enjoyment. The gifts for charitable and religious purposes, therefore, did not take effect upon the death of the testator or upon the happening of an event which would certainly occur, and consequently, within the meaning of the statute, could not be deducted from the gross estate. In this view of the case, the plaintiff is not entitled to recover.

This is a grant of a privilege by the Government and is to be construed in favor of the grantor. Hannibal, etc., R. R. Co. v. Missouri River Packet Co., 125 U. S. 260, 271; Swan v. Finch Co., 190 U. S. 143, 146; and Cornell v. Coyne, 192 U. S. 418, 431. This construction of the statute has been the uniform practice of the Treasury Department having in charge its execution, which should carry weight with the court. United States v. Moore, 95 U. S. 760, 763; Schell's Executors v. Fauché, 138 U. S. 562. But, more than this, it is in conformity with the regulations of the Treasury Department promulgated under the authority of the Secretary of the Treasury, which has the effect of law when reasonably adapted to the enforcement of the act and not in conflict with statutory provisions. United States v. Birdsall, 233 U. S. 223, 231; United States v. Small, 236 U. S. 405, 409, 411; United States v. Morehead, 243 U. S. 607; and Maryland Casualty Co. v. United States, 251 U. S. 342, 349.

The petition should be dismissed, and it is so ordered.

Moss, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

[fol. 24] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 20th day of February, A. D. 1928, judgment was ordered to be entered as follows:

Upon special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition should be, and it is, dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record in this cause, the amount thereof to be ascertained by the Clerk and collected by him, according to law, the amount of which is $45.10.

VI. Proceedings After Entry of Judgment

On April 18, 1928, the plaintiff filed a motion for a new trial.

On May 28, 1928, the court entered the following order on said motion:

Order

It is ordered this 28th day of May, 1928, that the plaintiff's motion for new trial be and the same is overruled.

By the court.

Fenton W. Booth, Ch. J.

[fol. 25] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 33,576. Court of Claims. Term No. 267. Ithaca Trust Company, sole surviving executor and trustee under the last will and testament of Edwin C. Stewart, deceased, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed July 13th, 1928. File No. 33,576.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 15, 1928

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.
FILED
AUG 3 1928
CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

October Term, 1928.

No. 267.

ITHACA TRUST COMPANY, SOLE SURVIVING EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF EDWIN C. STEWART, DECEASED, *Petitioner*,

vs.

THE UNITED STATES, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SIMON LYON,
R. B. H. LYON,
Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

	Page
Opinion Below	1
Grounds of Jurisdiction	1-2
History of the Case	2
Questions Presented	2
Statement	3
The Charitable Bequests	3
The Statute and Regulation	4
Decision of the Court of Claims	5
Summary of Argument	5

Argument:

1. Under the Revenue Act of 1918 bequests to charities are allowable deductions when their actual value can be definitely ascertained within the period prescribed for the ascertainment of deductions, and the value of the net estate upon which the tax is computed 6
2. Under the Revenue Act of 1918 bequests to charities are allowable deductions when vested and subject to divesture upon a possibility too remote to be properly given the effect of depriving such bequests of any substantial value, and that value can be ascertained with reasonable certainty 9

Conclusion 12

TABLE OF CASES.

Boston Safe Deposit Co. v. Nichols, 18 F. (2d) 660	7
Corpus Juris, Vol. 21, p. 980	6, 10
First National Bank of Birmingham v. Snead, 24 F. (2d) 186	6, 9
Herold v. Kahn, 159 Fed. Rep. 608	7
Herron *et al.* Exrs. v. Heiner, 24 F. (2d) 745	11
Humes *et al.* v. U. S., 276 U. S. . . .; 10 Ad. Op. 405	11
McArthur v. Scott, 113 U. S. 340, 379	6, 10
Union Trust Co. v. Heiner, 15 F. (2d) 362	7

STATUTE.

Revenue Act of 1918	4
Regulation 37, Art. 77	4

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vs.

THE UNITED STATES, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Court of Claims (R. 19) has not yet been officially reported.

Grounds of Jurisdiction.

The judgment to be reviewed was filed February 20, 1928. (R. 19.) Motion for new trial was over-

ruled May 28, 1928. The jurisdiction of this Court is based on 43 Stat. 939, Par. 3, C. 229 (Par. 288 Judicial Code U. S. C. A.).

History of the Case.

The suit is an action to recover Federal Estate Taxes illegally collected from the petitioner. (R. 9.)

The petition was filed in the Court of Claims February 26, 1926. (R. 5.)

A general traverse was filed on behalf of the United States on April 27, 1926. (R. 18.)

The case was heard upon a stipulation of the facts.

On January 25, 1928, the case was argued and submitted on merits. (R. 18.)

On February 20, 1928, the Court of Claims filed findings of fact and conclusions of law (R. 19) and ordered judgment dismissing the petition. (R. 25.)

On April 18, 1928, petitioner filed a motion for a new trial which was overruled on May 28, 1928. (R. 26.)

Questions Presented.

1. Whether, under the Revenue Act of 1918, bequests to charities and similar institutions enumerated in the Statute are allowable deductions when their actual value can be definitely ascertained prior to the date prescribed by the Statute and the regulation for the ascertainment of deductions and the computation of the tax.

2. Whether, under the Revenue Act of 1918, bequests to charities are allowable deductions when preceded by a life estate with the added provision "I also authorize my wife (life tenant) to use any additional sum that may be necessary to suitably maintain her in as much comfort as she nows enjoys," where the income from such portion of the estate is in ex-

cess of that necessary, in the absence of unusual circumstances, to maintain the life tenant suitably in as much comfort as she enjoyed at any time during the lifetime of the said testator.

Statement.

The decedent Edwin C. Stewart died testate on June 15, 1921, a resident of Ithaca in the State of New York. (R. 19.)

By his will he made certain bequests in remainder to trustees in trust exclusively for charitable and like purposes enumerated in the Act of 1918. (R. 15-17.)

The widow, the life tenant, died December 12, 1921, less than six months after the death of decedent. (R. 19.) The total amount actually paid or accrued to the widow as such life tenant was $10,110.04. (R. 21.)

Estate tax return was filed in which deduction was taken for the full amount paid to said charities. On review and audit the Commissioner assessed the additional tax herein sued for. (R. 20.)

Application for refund was duly filed but was denied and no refund has been made. (R. 21.)

The Charitable Bequests.

Briefly, the testator gave his entire residuary estate to his widow for life with the authorization "to use any additional sum from the principal * * * that may be necessary to suitably maintain her in as much comfort as she now enjoys." Upon the death of the wife the entire residuum was given to trustees exclusively for charitable and like purposes. (R. 15-17.) (Finding XV, R. 21.)

The Statute and Regulation.

Section 403: That for the purpose of the tax the value of the net estate shall be determined "(a) In the case of a resident by deducting from value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses * * * and such amounts reasonably required and actually expended for the support *during the settlement of the estate* of those dependent upon decedent. * * *

(2) (Property identified as previously taxed within five years.)

(3) The amount of all bequests, legacies, devises, or gifts * * * or to a trustee or trustees for such religious charitable, etc. * * * purposes. This *deduction* shall be made in the case of all decedents who have died since December 31, 1917:

* * * * * * * * * *

"Section 404. * * * The Executor shall also *at such time* and *in such manner as may be prescribed by regulations made pursuant to law*, file * * * a return * * * setting forth (a) the value of the *gross* estate of the decedent *at the time of his death* * * *; (b) the deductions allowed in Section 403; (c) *the value of the net estate of the decedent, as defined in Section 403;* and (d) the tax paid or payable thereon * * *."

Article 77 of Regulations 37 provides:

"* * * A return on Form 706 is required * * *. It must be filed within one year after the date of death, unless an extension is had, * * *."

Decision of Court of Claims.

In its decision the Court of Claims ignored the fact that the actual value of the bequests to charities were definitely ascertained when the tax was computed, giving as its reason for dismissing the petition:

> "* * * a contingency permeates the gifts to charity which may prevent any of them from ever going into possession and enjoyment * * *."

Summary of Argument.

1. UNDER THE REVENUE ACT OF 1918 BEQUESTS TO CHARITIES ARE ALLOWABLE DEDUCTIONS WHEN THEIR ACTUAL VALUE CAN BE DEFINITELY ASCERTAINED WITHIN THE PERIOD PRESCRIBED FOR THE ASCERTAINMENT OF DEDUCTIONS, AND THE VALUE OF THE NET ESTATE UPON WHICH THE TAX IS COMPUTED.

2. UNDER THE REVENUE ACT OF 1918 BEQUESTS TO CHARITIES ARE ALLOWABLE DEDUCTIONS WHEN VESTED AND SUBJECT TO DIVESTURE UPON A POSSIBILITY TOO REMOTE TO BE PROPERLY GIVEN THE EFFECT OF DEPRIVING SUCH BEQUESTS OF ANY SUBSTANTIAL VALUE, AND THAT VALUE CAN BE ASCERTAINED WITH REASONABLE CERTAINTY.

I.

UNDER THE REVENUE ACT OF 1918 BEQUESTS TO CHARITIES ARE ALLOWABLE DEDUCTIONS WHEN THEIR ACTUAL VALUE CAN BE DEFINITELY ASCERTAINED WITHIN THE PERIOD PRESCRIBED FOR THE ASCERTAINMENT OF DEDUCTIONS, AND THE VALUE OF THE NET ESTATE UPON WHICH THE TAX IS COMPUTED.

The Revenue Act of 1918 allowed charitable and similar bequests as *deductions*. It set forth in detail the deductions allowable, many of which could be ascertained only after the period of administration. It refers to the value of the *gross* estate *at date of death*, but refers to the *net* estate as defined in Section 403. The *net* estate is the *gross* estate at date of death, less the deductions allowed in Section 403. The *net* estate cannot be determined from facts known at date of death, but is dependent upon facts which subsequently develop. The time set for the ascertainment of the *net* estate is within one year from date of death.

At testator's death the bequests in the instant case were vested.

> First National Bank of Birmingham v. Snead, 24 F. (2d) 186.
> McArthur v. Scott, 113 U. S. 340, 379.
> 21 Corpus Juris 980.

They had a substantial value; and their actual value, because of the death of the life tenant within six months from decedent's death, was definitely ascertainable, during the period of administration while the legal title to the residuum was in the petitioner, and prior to the date prescribed for the ascertainment of deductions and the computation of the tax.

The courts uniformly hold that the value of the net estate is to be determined by facts known at the time of the computation rather than by facts known at the time of decedent's death.

In the case of Boston Safe Deposit Co. v. Nichols, 18 F. (2d) 660, the Court said:

> "* * * It is the plaintiff's contention that inasmuch as the equitable life interest terminated before it was required to pay the tax, it had a right to deduct the actual value of the future interest *determined by facts known at the time of the computation rather than by facts known at the time of decedent's death.* (Italics ours.)
>
> "* * * It is undoubtedly true the liability for the tax is fixed at the time of the decedent's death.
>
> "* * * *It is not, however, true that the amount of the net estate, which is the measure of the tax, can be ascertained from facts known at the time of the death.* The amount of other deductions, * * * all depend upon facts subsequently developed, * * *."

In Herold v. Kahn, 159 Fed. Rep. 608, the tax was assessed and collected under the Revenue Act of 1898 upon the life estate of a legatee who had died approximately two years after the death of the testator, but while the property was still in the hands of the executor. At the time the tax was computed neither the executor nor the Commissioner knew of the death of the life tenant. It was held that the facts known at the date of the computation (actual value of the life estate) should be used, and taxpayer was given judgment.

In Union Trust Co. v. Heiner, 15 F (2d) 362, the widow, the life tenant, died within twelve hours after the death of the husband. The court said:

> ... * * * The taxing act in question manifestly assumes that the net estate will be ascertained before the tax is computed, and in the instant case where the life estate of the widow ended *prior to the determination of the amount of the tax*, only the actual not the theoretical value of that life estate should enter into the computation * * * ." (Italics ours.)

The *value* of the bequests in the instant case was not ascertainable upon facts known at the time of decedent's death. The bequests were of testator's residuum, the value of which depended upon the amount of *other deductions* allowed by the statute which could not be ascertained except upon facts which developed during the period of administration.

We submit, that the fact that this *value* was not ascertainable until subsequent to date of decedent's death, does not prevent the allowance of the deduction when definitely ascertained within the year. Otherwise, if a decedent left his entire estate to charity, no deduction would be allowed.

But the statute and regulations prescribe the period within which to ascertain deductions, and the death of the widow in the instant case within that period, made the *value* of the bequests definite at the date of the computation of the tax, and such value was therefore deductible.

II.

UNDER THE REVENUE ACT OF 1918 BEQUESTS TO CHARITIES ARE ALLOWABLE DEDUCTIONS WHEN VESTED AND SUJECT TO DIVESTURE UPON A POSSIBILITY TOO REMOTE TO BE PROPERLY GIVEN THE EFFECT OF DEPRIVING SUCH BEQUESTS OF ANY SUBSTANTIAL VALUE, AND THAT VALUE CAN BE ASCERTAINED WITH REASONABLE CERTAINTY.

This question was recently decided in favor of the taxpayer by the Circuit Court of Appeals for the Fifth Circuit in the case of the First National Bank of Birmingham v. Snead, 24 F (2d) 186. In that case the will contained the following provision:

> "If at any time, in the opinion of said Trustees, the net income from said trust estate shall not be sufficient for the proper support and comfort of my said wife, the Trustees shall pay over to my said wife such additional sum or sums out of the principal of said trust estate as to them may seem necessary or desirable for such purpose * * *."

The remainders were to charities, and the widow still lived at the date of the computation of the tax. While in the instant case the widow died within the year of administration. The court said:

> "The mentioned charitable institutions having been in existence when the will took effect and having been capable of taking the bequests in their favor upon the death of testators widow, * * * the estates or interests devised to those institu-

tions were vested. McArthur v. Scott, 113 U. S. 340, 379; 21 Corpus Juris 980, * * *."

"Under the above set out provision of the statute the existence of those bequests required some deduction * * * unless the power * * * to invade the corpus * * * had such scope or effect as to keep the bequests * * * from having any substantial ascertainable value *when the value of the testator's net estate was to be determined.* * * * The authority of the trustees to make payments to the widow out of the corpus * * * was dependent upon their forming the opinion that the net income from the trust estate was not sufficient for the proper comfort and support of the widow. The trustees are obligated to act in good faith * * *. They are not empowered arbitrarily to invade the corpus * * *; and the exercise of the discretion is subject to judicial revision and control. * * *

"From the allegations of the complaint it is barely possible, but wholly improbable, that at any time any sum in addition to the net income * * * will * * * be necessary * * * to be paid to her * * *. Those allegations indicate that the possibility of the exercise in good faith of the power conferred on the trustee resulting in the exhaustion of the trust estate is so remote that a finding that, by reason of the existence of that power, the vested interests of the charitable institutions had no substantial value when the will took effect, would be arbitrary and unwarranted. * * * For estate tax purposes the approximate amount of that value was ascertainable * * *."

Reference is made to Finding XIII (R. 21) in the instant case, wherein the Court of Claims found that the widow (life tenant) and decedent had for many years prior to his death lived in a simple and unpre-

tentious style spending together less than the income produced by the estate; that the income from the estate after the payment of debts and legacies (one of which was $50,000. to the widow) was in excess of the sum necessary in the absence of unusual circumstances to suitably maintain the widow in as much comfort as she enjoyed at any time during the lifetime of the testator.

We submit that upon the theory of the above case, which is directly in conflict with the decision of the Court of Claims in the instant case, the petitioner is also entitle to recover.

The instant case differs from the case of Humes, *et al.*, vs. United States, 276 U. S.,. . ; 10 Ad. Op. 405, recently decided by this Court; First, because in that case the legacies to charities did not vest but depended upon the death of testator's niece before she reached the age of forty years, without issue then living; Second, because there was no reasonable method to ascertain the value of charitable bequests at the date of the computation of the tax, while in the instant case the *actual* value of such bequests was then ascertainable.

A recent case distinguishing between such legacies when vested is the case of Herron *et al.* Executors v. Heiner, 24 F (2d) 745, wherein the court said:

> "The cases cited by the defendant to support the claim that nothing vests in enjoyment in charities, until the death of the incompetent, do not sustain the decision. In those cases, the charitable use was to arrive at some future time, upon the happening of some contingency. Here, not only have the charitable interests vested, but a total of $342,443.38 from the income of the trust

fund has already been actually paid to the various charitable institutions, or permanently set aside for future payment, in accordance with the provisions of the will."

* * * * * * * * *

"In conclusion: The clear purpose of the testator, in the humane and philanthropic distribution of his large estate must not be defeated, and the manifest purpose of Congress exempting charitable gifts from taxation must not be thwarted by any narrow and meaningless interpretation of testator's will."

Conclusion.

In view of all the foregoing; the public importance of the proper construction of the Revenue Act in question; and the conflicting decisions of the Circuit Court of Appeals for the Fifth Circuit, *supra*, and the Court of Claims in the instant case, it is respectfully submitted that the decision of the lower Court herein should be reviewed by this Court and certiorari granted herein as prayed.

Respectfully submitted,

SIMON LYON,
R. B. H. LYON,
Attorneys for Petitioners.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 267.

ITHACA TRUST COMPANY, Sole Surviving Executor and Trustee Under the Last Will and Testament of EDWIN C. STEWART, Deceased, *Petitioner,*

vs.

THE UNITED STATES, *Respondent.*

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR PETITIONER.

SIMON LYON,
R. B. H. LYON,
A. F. PRESCOTT, JR.,
Attorneys for Petitioner.

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SUBJECT INDEX.

	Page
Opinion Below	1
Grounds of Jurisdiction	1
History of the Case	2
Questions Presented	2-3
Statement	3
The Charitable Bequests	3
The Statute and Regulation	4
Decision of the Court of Claims	4
Summary of Argument	5
Argument:	
1. Under the Revenue Act of 1918 bequests to charities are allowable deductions when their actual value can be definitely ascertained within the period prescribed for the ascertainment of deductions, and the value of the net estate upon which the tax is computed	5
2. Under the Revenue Act of 1918 bequests to charities are allowable deductions when vested and subject to divesture upon a possibility too remote to be properly given the effect of depriving such bequests of any substantial value, and that value can be ascertained with reasonable certainty	10
Conclusion	15

TABLE OF CASES.

Boston Safe Deposit Co. v. Nichols, 18 F. (2d) 660	6
Central Union Tr. Co., *et al.*, v. U. S., 61 C. Cls. 828	8
Corpus Juris, Vol. 21, p. 980	6, 11
First National Bank of Birmingham v. Snead, 24 F. (2d) 186	6, 10
Herold v. Kahn, 159 Fed. Rep. 608	8
Herron, *et al.* Exrs. v. Heiner, 24 F (2d) 745	14
Hertz v. Woodman, 218 U. S. 205	7
Humes, *et al.* v. U. S., 276 U. S. ; 10 Ad. Op. 405	13, 14
McArthur v. Scott, 113 U. S. 340, 379	6, 11
Exrs. of Ruff v. Comm., 13 B. T. A. 85	12
Union Trust Co. v. Heiner, 19 F. (2d) 362	8

STATUTE.

Revenue Act of 1918	4
Regulation 37, Art. 77	4

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vs.

THE UNITED STATES, *Respondent.*

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR PETITIONER.

Opinion Below.

The opinion of the Court of Claims (R. 19) has not yet been officially reported.

Grounds of Jurisdiction.

The judgment to be reviewed was filed February 20, 1928. (R. 19) Motion for new trial was overruled May 28, 1928. The jurisdiction of this Court is based on 43 Stat. 939, Par. 3, C. 229 (Par. 288 Judicial Code U. S. C. A.).

History of the Case.

The suit is an action to recover Federal Estate Taxes illegally collected from the petitioner. (R. 9)

The petition was filed in the Court of Claims February 26, 1926. (R. 5)

A general traverse was filed on behalf of the United States on April 27, 1926. (R. 18)

The case was heard upon a stipulation of the facts. (R. 19)

On January 25, 1928, the case was argued and submitted on merits. (R. 18)

On February 20, 1928, the Court of Claims filed findings of fact and conclusions of law (R. 19) and ordered judgment dismissing the petition. (R. 25)

On April 18, 1928, petitioner filed a motion for a new trial which was overruled on May 28, 1928. (R. 26)

On July 13, 1928, a petition for writ of certiorari was filed (R. 26) and on October 15, 1928, the petition was granted.

Questions Presented.

1. Whether, under the Revenue Act of 1918, bequests to charities and similar institutions enumerated in the Statute are allowable deductions when their actual value can be definitely ascertained prior to the date prescribed by the Statute and the regulation for the ascertainment of deductions and the computation of the tax.

2. Whether, under the Revenue Act of 1918, bequests to charities are allowable deductions when preceded by a life estate with the added provision "I also authorize my wife (life tenant) to use any additional sum that may be necessary to suitably maintain her in as much

comfort as she now enjoys," where the income from such portion of the estate is in excess of that necessary, in the absence of unusual circumstances, to maintain the life tenant suitably in as much comfort as she enjoyed at any time during the lifetime of the said testator.

Statement.

The decedent, Edwin C. Stewart, died testate on June 15, 1921, a resident of Ithaca in the State of New York. (R. 19)

By his will he made certain bequests in remainder to trustees in trust exclusively for charitable and like purposes enumerated in the Act of 1918. (R. 15-17)

The widow, the life tenant, died December 12, 1921, *less than six months after the death of testator.* (R. 19) The total amount actually paid or accrued to the widow as such life tenant was $10,110.04. (R. 21)

Estate tax return was filed in which deduction was taken for the full amount paid to said charities. On review and audit the Commissioner assessed the additional tax herein sued for. (R. 20)

Application for refund was duly filed but was denied and no refund has been made. (R. 21)

The Charitable Bequests.

Briefly, the testator gave his entire residuary estate to his widow for life with the authorization "to use any additional sum from the principal * * * that may be necessary to suitably maintain her in as much comfort as she now enjoys." Upon the death of the wife the entire residuum was given to trustees exclusively for charitable and like purposes. (R. 15-17) (Finding XV, R. 21)

The Statute and Regulation.

"Section 403: That for the purpose of the tax the value of the net estate shall be determined (a) In the case of a resident by deducting from value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses * * * and such amounts reasonably required and actually expended for the support *during the settlement of the estate* of those dependent upon decedent.

(2) (Property identified as previously taxed within five years).

(3) The amount of all bequests, legacies, devises, or gifts * * * or to a trustee or trustees for such religious, charitable, etc., * * * purposes. This *deduction* shall be made in the case of all decedents who have died since December 31, 1917:

* * * * * * * * *

"Section 404. * * * The Executor shall also *at such time* and *in such manner as may be prescribed by regulations made pursuant to law*, file * * * a return * * * setting forth (a) the value of the *gross* estate of the decedent *at the time of his death* * * *; (b) the deductions allowed in Section 403: (c) *the value of the net estate of the decedent, as defined in Section 403;* and (d) the tax paid or payable thereon * * *."

Article 77 of Regulations 37 provides:

"* * * A return on Form 706 is required * * *. It must be filed within one year after the date of death, unless an extension is had, * * *." (Italics ours).

Decision of Court of Claims.

In its decision the Court of Claims ignored the fact that the actual value of the bequests to charities was definitely ascertained when the tax was computed, giving as its reason for dismissing the petition:

"* * * a contingency permeates the gifts to charity which may prevent any of them from ever going into possession and enjoyment * * *."

Summary of Argument.

1. Under the revenue act of 1918 bequests to charities are allowable deductions when their actual value can be definitely ascertained within the period prescribed for the ascertainment of deductions, and the value of the net estate upon which the tax is computed.

2. Under the revenue act of 1918 bequests to charities are allowable deductions when vested and subject to divesture upon a possibility too remote to be properly given the effect of depriving such bequests of any substantial value, and that value can be ascertained with reasonable certainty.

I.

Under the revenue act of 1918, bequests to charities are allowable deductions when their actual value can be definitely ascertained within the period prescribed for the ascertainment of deductions, and the value of the net estate upon which the tax is computed.

The Revenue Act of 1918 allowed charitable and similar bequests as *deductions*. It set forth in detail the deductions allowable, many of which could be ascertained after the period of administration only. It refers to the value of the *gross* estate *at date of death*, but refers to the *net* estate as defined in Section 403. The *net* estate is the *gross* estate at date of death, less the deductions allowed in Section 403, of which charitable and similar bequests is one. The *net* estate cannot be determined from facts known at date of death, but

is dependent upon facts which subsequently develop. The time set for the ascertainment of the *net* estate is within one year from date of death.

At testator's death the charitable bequests in the instant case were vested.

> First National Bank of Birmingham v. Snead, 24 F. (2d) 186.
> McArthur v. Scott, 113 U. S. 340, 379.
> 21 Corpus Juris 980.

They had a substantial value at date of death; and their actual value, because of the death of the life tenant within six months from decedent's death, was definitely ascertained, during the period of administration, while the legal title to the residuum was in the petitioner, and prior to the date prescribed for the ascertainment of deductions and the computation of the tax.

We submit that the only theory upon which the deduction of a charitable bequest should be disallowed is, that the *amount* (or value) of such bequest is not ascertainable within the period prescribed for the ascertainment of deductions from the *gross* estate in order determine the *net* estate—the measure of the tax.

The courts uniformly hold that the value of the net estate is to be determined by facts known at the time of the computation rather than by facts known at the time of decedent's death.

In the case of Boston Safe Deposit Co. v. Nichols, 18 F. (2d) 660, (Revenue Act of 1918), the Court said:

> "* * * It is the plaintiff's contention that inasmuch as the equitable life interest terminated before it was required to pay the tax, it had a right to deduct the actual value of the future interest *determined by facts known at the time of the com-*

putation rather than by facts known at the time of decedent's death.

"* * * It is undoubtedly true the liability for the tax is fixed at the time of the decedent's death.

"Hertz v. Woodman, 218 U. S. 205. *It is not, however, true that the amount of the net estate, which is the measure of the tax, can be ascertained from facts known at the time of the death.* The amount of other deductions, such as expenses, losses incurred during the settlement of the estate, amount required for support of dependents, *all depend upon facts subsequently developed,* and the law concedes to the taxpayer the right to deduct the amount of expenses actually incurred, of losses actually suffered, and the amount actually allowed dependents under the laws of the state. The law does not permit the taxing authorities to estimate or approximate, or to indulge in speculation as to the probable amounts of such deductions. I do not mean to imply that the government may not resort to mortuary or experience tables for approximate results *when it is impossible to obtain definite and actual values.* The taxpayer is entitled to deduct from the gross estate the amount of the bequest to the charitable organization and those administering the law are wholly without authority to add to the taxpayers burden by invoking rules and regulations adopted by the administrative department. This is precisely what the defendant has done in the present case. Although the exact amount of the charitable bequest was susceptible of certain and definite ascertainment, the defendant has refused to adopt the actual value and has insisted upon a result based upon probabilities. The result of defendants refusal is to deny the plaintiff a deduction to which it is clearly entitled under the statute. The statute makes no provision for the use of mortuary tables, and they cannot be read into the statute as absolute rules which the law will require to be ap-

> plied to determine the duration of a life interest, or remainder interest, when the actual value can be ascertained. Vicksburg & Meridian R. R. Co. v. Putnam, 118 U. S. 545; Kahn v. Herold, 147 Fed. 575: 'Their use is only justified when no better evidence is obtainable' Herold v. Kahn, 159 Fed. 608." (Italics ours).

In Herold v. Kahn, 159 Fed. Rep. 608, the tax was assessed and collected under the Revenue Act of 1898 upon the life estate of a legatee who had died approximately two years after the death of the testator, but while the property was still in the hands of the executor. (The Act of 1898 taxed the right to receive as distinguished from the right to transmit). At the time the tax was computed neither the executor nor the Commissioner knew of the death of the life tenant. It was held that the facts known at the date of computation (actual value of the life estate) should be used, and the taxpayer was given judgment.

In Union Trust Co. v. Heiner, 19 F. (2d) 362, (Revenue Act of 1918), the widow, the life tenant, died within twelve hours after the death of the husband. The Court said:

> ". . . . The taxing act in question manifestly assumes that the *net estate will be ascertained before the tax is computed*, and in the instant case where the life estate of the widow ended *prior to the determination of the amount of the tax*, only the actual and not the theoretical value of that life estate should enter into the computation . . . ." (Italics ours)

In the case of the Central Union Trust Co. et al. v. U. S., 61 Ct. Cls. 828, 840, (Revenue Act of 1918), testator, a resident of the State of New York, bequeathed

the residue of his estate in trust for certain charitable purposes, directing his executors and trustees to cause a corporation to be formed with authority to administer the trust.

However, the income from such residuum, between the date of death and the date of the organization of the corporation, was to be paid to testator's nephew.

The Court said:

> "* * * We think that what the commissioner should have done was to take either the actual income paid to the nephew and add it to the net estate or to have found a present value of this income as of the date of death, increasing the net estate by this amount.
>
> "The contemplated foundation was formed within a year from the testator's death. The tax upon the value of the net estate was 'due one year after decedent's death'. The State statute allowed the executors a year within which to pay legacies. *When the year ended* the executors were in a position to make their return *so as to include the deductible items allowed by section 403 to arrive at the net estate*, which alone was taxable. It is proper, therefore, to limit the nephew's interest by reason of the income to be paid *to him to the one year within which all the facts became known*, and the right to possession of the corpus of the residuary estate became absolute. * * *" (Italics ours.)

The *value* of the bequests in the instant case was not ascertainable upon facts known at the time of the decedent's death. The bequests were of the testator's residuum, the value of which depended upon the amount of *other deductions* allowed by the statute which could not be ascertained except upon facts which developed during the period of administration.

We submit, that the fact that this *value* was not ascertainable until subsequent to date of decedent's death, does not prevent the allowance of the deduction, as its *actual* value was definitely ascertained within the year. Otherwise, if a decedent left his entire estate to charity, no deduction therefor would be allowed.

But the statute and regulations prescribe the period within which to ascertain deductions, and the death of the widow in the instant case within the period, made the *value* of the bequests definite, and such value was therefore deductible.

II.

Under the revenue act of 1918 bequests to charities are allowable deductions when vested and subject to divesture upon a possibility too remote to be properly given the effect of depriving such bequests of any substantial value, and that value can be oscertained with reasonable certainty.

This question was recently decided in favor of the taxpayer by the Circuit Court of Appeals for the Fifth Circuit in the case of the First National Bank of Birmingham v. Snead, 24 F (2d) 186. In that case the will contained the following provision:

> "If at any time, in the opinion of said Trustees, the net income from said trust estate shall not be sufficient for the proper support and comfort of my said wife, the Trustee shall pay over to my said wife such additional sum or sums out of the principal of said trust estate as to them may seem necessary or desirable for such purpose * * *."

The remainders were to charities, and the widow was living at the date of the computation of the tax, while in the instant case the widow died within the year of administration. The court said:

> "The mentioned charitable institutions having been in existence when the will took effect and having been capable of taking the bequests in their favor upon the death of testators widow, * * * the estates or interests devised to those institutions were vested. McArthur v. Scott, 113 U. S. 340, 379; 21 Corpus Juris 980, * * *."
>
> "Under the above set out provision of the statute the existence of those bequests required some deduction * * * unless the power * * * to invade the corpus * * * had such scope or effect as to keep the bequests * * * from having any substantial ascertainable value *when the value of the testator's net estate was to be determined.* * * * The authority of the trustees to make payments to the widow out of the corpus * * * was dependent upon their forming the opinion that the net income from the trust estate was not sufficient for the proper comfort and support of the widow. The trustees are obliged to act in good faith * * *. They are not empowered arbitrarily to invade the corpus * * *; and the exercise of the discretion is subject to judicial revision and control. * * *
>
> "From the allegations of the complaint it is barely possible, but wholly improbable, that at any time any sum in addition to the net income * * * will * * * be necessary * * * to be paid to her * * *. Those allegations indicate that the possibility of the exercise in good faith of the power conferred on the trustee resulting in the exhaustion of the trust estate is so remote that a finding that, by reason of the existence of that power, the vested interests of the charitable institutions had

> no substantial value when the will took effect, would be arbitrary and unwarranted. * * * For estate tax purposes the approximate amount of that value was ascertainable * * *." (Italics ours)

Reference is made to Finding XIII (R. 21) in the instant case, wherein the Court of Claims found that the widow (life tenant) and decedent had for many years prior to his death lived in a simple and unpretentious style, spending together less than the income produced by the estate; that the income from the estate after the payment of debts and legacies (one of which was $50,000 to the widow) was in excess of the sum necessary in the absence of unusual circumstances to suitably maintain the widow in as much comfort as she enjoyed at any time during the lifetime of the testator.

We submit that upon the theory of the above case, which is directly in conflict with the decision of the Court of Claims in the instant case, the petitioner is also entitled to recover.

This question was recently considered by the United States Board of Tax Appeals in the case of the Mercantile Trust Co., Executor of Frank A. Ruf, v. Commissioner of Internal Revenue, 13 B. T. A. 85. In that case the bequest to the widow was as follows:

> "I direct my Trustee * * * to pay over unto my wife * * * all of the net income and revenue derived from said Trust estate, or, if need be, such part of the corpus as may be necessary for the comfort, maintenance and support of my wife during her life. A request in writing, to my Trustee, made by my wife, stating that the sum requested by her is needed for her comfort, maintenance and support, shall be authority to my Trustee to pay

> unto her any sum so requested, out of the corpus; or, in the event of her incapacity, then my Trustee may, in its discretion, use so much of the corpus as may be necessary for her comfort, maintenance and support. * * *"

The remainder was bequeathed to charities, and the Board, after a reference to the case of the First National Bank of Birmingham v. Snead, *supra*, used the following language:

> " * * * We think that the averments of the complaint show such a state of facts that the existence of the power conferred on the trustees to invade the corpus of the trust estate cannot properly be given the effect of depriving the bequests to charitable institutions of any substantial value. For estate tax purposes the approximate amount of that value was ascertainable, and was allowable as a deduction from the testator's gross estate. * * * "
>
> " * * * Although the power to demand further sums of money in addition to the amounts specifically provided for her * * * was expressly placed in the widow, her power is limited to those sums necessary for 'her comfort, maintenance and support', and they must be reasonable under all circumstances. * * * "

The Board then makes reference to the other cases cited *supra*, and concludes this question with a reference to the case of Mitchell et al., Executor of Gates, v. U. S., 63 Court of Claims 613; affirmed by this Court under the title of Humes et al. v. U. S., 267 U. S. 487. The Board said:

> " * * * The facts in that case, however, are clearly distinguishable from those of the instant proceeding. * * * "

The instant case differs from the Humes case, *supra*, First, because in that case the legacies to charities did not vest but depended upon the death of testator's niece before she reached the age of forty years, without issue then living; Second, because there was no reasonable method to ascertain the value of charitable bequests at the date of the computation of the tax, while in the instant case the *actual* value of such bequests was ascertained within the year prescribed by the statute and regulation.

A recent case distinguishing between such legacies when vested is the case of Herron et al., Executors, v. Heiner, 24 F (2d) 745, wherein the court said:

> "The cases cited by the defendant to support the claim that nothing vests in enjoyment in charities, until the death of the incompetent, do not sustain the decision. In those cases, the charitable use was to arrive at some future time, upon the happening of some contingency. Here, not only have the charitable interest vested, but a total of $342,443.38 from the income of the trust fund has already been actually paid to the various charitable institutions, or permanently set aside for future payment, in accordance with the provisions of the will."
>
> • • • • • • •
>
> "In conclusion: The clear purpose of the testator, in the humane and philanthropic distribution of his large estate must not be defeated and the manifest purpose of Congress exempting charitable gifts from taxation must not be thwarted by any narrow and meaningless interpretation of testator's will."

Conclusion.

The judgment of the Court of Claims should be reversed and such judgment directed as to this Honorable Court seems proper.

Respectfully submitted,

SIMON LYON,
R. B. H. LYON,
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Attorneys for Petitioner.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
The statute and regulations	2
Statement	5
Argument:	
I. The view of the Treasury Department, that contingent bequests to charity are not deductible even though their value may be ascertained by the use of evidence ordinarily admissible, is open to some question	8
II. It is doubtful whether the value of the charitable bequests here involved was provable at the date of death of the testator	11
III. The death of the life tenant before assessment or payment of the tax permits valuation of the contingent remainders to charities and may allow their deduction	15
Conclusion	17

CITATIONS

Cases:	
Boston Safe Deposit & Trust Co. v. *Nichols*, 18 F. (2d) 660	15
First National Bank of Birmingham v. *Snead*, 24 F. (2d) 186	14, 15
Herold v. *Kahn*, 159 Fed. 608	16
Herron v. *Heiner*, 24 F. (2d) 745	14, 15
Kahn et al., Exrs., v. *Bowers, Collector*, 9 F. (2d) 1018	13
Mitchell v. *United States*, 63 C. Cls. 613; affd., No. 376, October Term, 1927	9
Union Trust Co. v. *Heiner*, 19 F. (2d) 362	15
Statutes, etc.:	
Revenue Act of 1918, c. 18, Sec. 403, 40 Stat. 1057, 1098	2
Treasury Regulations—	
No. 37 (Aug. 8, 1919)—	
Art. 20	4
Art. 53	3
Art. 56	4, 17
No. 63 (1922 ed.)—	
Art. 47	8
Art. 50	8
No. 68 (1924 ed.)—	
Art. 44	9
Art. 47	9
No. 70 (1926 ed.)—	
Art. 44	9
Art. 47	9

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 267

ITHACA TRUST COMPANY, SOLE SURVIVING EXECUTOR and Trustee under the last will and testament of Edwin C. Stewart, deceased, petitioner

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 22) in this case has not yet been officially reported.

JURISDICTION

The judgment sought to be reviewed was entered February 20, 1928. (R. 25.)

A motion for new trial was overruled May 28, 1928. (R. 26.)

Petition for certiorari was filed July 13, 1928. (R. 26.) Jurisdiction of this Court to issue the writ

is found in Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The testator's residuary estate was given by his will to his wife for life. The will authorized the life tenant to dispose of any part of the realty at a price which, in her judgment, was for the best interest of the estate, and to use any additional sum from the principal of the estate that might be necessary to support her suitably in "as much comfort as she now enjoys" and gave the "balance" of such residuary estate to certain charities. The wife died about six months after the death of the testator, before an estate tax return was made or a tax paid. The question presented is whether the estate is entitled to a deduction under the provisions of Section 403 (a) (3) of the Revenue Act of 1918 on account of the gifts to charities.

THE STATUTE AND REGULATIONS

The portions of Section 403 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1098) which are applicable are as follows:

> That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of gross estate—
>
> * * * * *
>
> (3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any

> political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917 * * *.

Articles 53 and 56, Regulations 37, approved August 8, 1919, relating to estate taxes under the Revenue Act of 1918, were as follows:

> ART. 53. PUBLIC, CHARITABLE, AND SIMILAR BEQUESTS.—Bequests to religious, charitable, scientific, literary, or educational corporations are deductible only if the corporation is organized or operated exclusively for one of the purposes specified (see Art. 54). Similarly, in the case of a trust, the trust must be exclusively for such purposes. It does not prevent deduction, however, that the property placed in trust is also subject to another trust for a private purpose. Thus, where money or property is placed in trust to pay the income to an individual during life, and then to pay or deliver the same to a charitable corporation, or apply the principal to

a charitable purpose, the charitable bequest or devise forms the basis for a deduction. The amount of the deduction, in such case, is the value, at the date of the decedent's death, of the remainder interest in the money or property which is devised or bequeathed to charity. For the manner of determining the value of such remainder interest, see Article 20. Gifts made in the decedent's lifetime are deductible only if made in contemplation of death, or intended to take effect at or after death, and the property is consequently included in the gross estate. Gifts made in satisfaction of a legacy are also deductible. The deduction is not limited in the case of the estates of residents to bequests to domestic corporations or to trustees for use within the United States.

ART. 56. CONDITIONAL BEQUESTS.—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise, or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed.

Article 20, Regulations 37, above referred to, provides for the valuation of annuities, life and remainder interests, according to mortality tables set up in the regulation.

STATEMENT

Edwin C. Stewart died June 15, 1921. (R. 19.) His will made certain specific bequests (R. 14–15), and then provided (R. 15):

> Twelfth. I give unto my beloved wife, Annie L. Stewart, of Ithaca, New York, the use for her natural life of all the rest, residue, and remainder of my property, real, personal, and mixed, of which I may die seized, with full authority to sell and dispose of any real estate of which I may die seized, for such figures as she may, in her judgment, deem for the best interest of my estate. I also authorize my wife, Annie L. Stewart, to use any additional sum from the principal of my estate that may be necessary to suitably maintain her in as much comfort as she now enjoys. I request my wife, Annie L. Stewart, from the said income of my estate, to give annually a sum sufficient in her judgment for the maintenance of my cousin, Grace L. Ely of West Allenhurst, New Jersey.

The will directed the testator's executor "from the balance of my estate at the death of my wife" to pay certain sums of money to certain institutions and to create a trust of the residue of such balance for another institution. (R. 15–17.) All of such institutions, with the exception of one to which a comparatively small amount of money was to be paid, were of such character that bequests, legacies, devises, or gifts to them or for their use are to be

deducted under Section 403 of the Revenue Act of 1918 from the value of gross estate for the purpose of determining net estate subject to estate tax. (R. 21–22.)

The petitioner and testator's widow qualified as executors. (R. 19.) On December 12, 1921, the widow died, leaving the petitioner the sole surviving executor. (R. 19.)

On June 14, 1922, the petitioner as executor made and filed an estate tax return and paid the estate tax shown to be due. Subsequently the Commissioner of Internal Revenue found an additional estate tax to be due. The petitioner filed a claim for abatement of this additional tax, the greater portion of which was disallowed. Thereupon petitioner paid the additional tax. Petitioner later filed a claim for refund which was rejected by the Commissioner of Internal Revenue, and this suit resulted. (R. 20–21.)

There is no express finding by the Court of Claims that the amount involved in this suit represents additional tax due to the refusal of the Commissioner to permit deduction from the testator's gross estate of the value of the bequests to charities, but this is stated in the opinion of the Court of Claims (R. 22–23) and is a necessary inference from the petition and the facts found.

The value of the entire residuary estate at the date of the testator's death was $347,244.51. (R. 21.) The widow was born on May 27, 1860. (R.

20.) The value of the life estate in $347,244.51 to a person 61 years of age (as shown by mortuary tables) is $126,329.64. (R. 21.)

The Court of Claims found (Finding XIII, R. 21):

> For many years prior to the death of said Edwin C. Stewart, he and his widow, Annie L. Stewart, lived in Ithaca, New York, in a simple and unpretentious style, spending each year less than the income produced by the estate of said testator; and the income from the estate of said testator was, at his death, and during the life of the widow, in excess of the sum necessary to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of said testator. After the payment of debts and the specific legacies, the estate produced an income in excess of the sum necessary, in the absence of unusual circumstances, to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of the said testator.

The Court of Claims dismissed the petition, holding that the petitioner was not entitled to any deduction on account of the bequests to charities. (R. 25.)

It is not entirely clear whether the decision of the Court of Claims rests upon the proposition that contingent bequests to charities are never deductible even though their value is provable, or upon the proposition that in this case the value of the be-

quests was not provable. We will discuss these propositions in order. The Court of Claims seems to have assumed that these propositions were to be applied upon the basis of the facts as they existed at the date of the testator's death and that the subsequent death of the life tenant before a tax return was filed or tax paid was immaterial. We will discuss this question as our third point.

ARGUMENT

I

THE VIEW OF THE TREASURY DEPARTMENT, THAT CONTINGENT BEQUESTS TO CHARITY ARE NOT DEDUCTIBLE EVEN THOUGH THEIR VALUE MAY BE ASCERTAINED BY THE USE OF EVIDENCE ORDINARILY ADMISSIBLE, IS OPEN TO SOME QUESTION

The regulations issued by the Treasury Department relating to estate taxes have consistently provided that if a devise or bequest to charity is certain to vest and can not be ultimately defeated its value is deductible, and that experience tables of mortality may be resorted to to ascertain the value, but where the bequests to charity are contingent and it appears that they may never vest or be defeated before the time for enjoyment arrives, the value of the charitable bequest may not be deducted. The regulations above quoted, contained in Regulations No. 37, are found without substantial change in subsequent editions relating to later Revenue Acts. (See Regulations 63, 1922 edition, Articles 47 and 50; Regulations 68, 1924 edition,

Articles 44 and 47; Regulations 70, 1926 edition, Articles 44 and 47.)

In *Mitchell* v. *United States* (63 C. Cls. 613) the Court of Claims apparently adopted the view of the Treasury Department. In its opinion in the present case that court said (R. 24):

> In the case of *Mitchell et al.* v. *United States,* 63 C. Cls. 613, it was held that the revenue act applicable here, authorizing deductions from the gross estate of the amount of all bequests or gifts to a trustee, exclusively for religious or charitable purposes, applied only to bequests or gifts intended to take effect "upon the testator's death or upon the happening of an event that will certainly occur," and that if the contingency upon which the bequest was to go to charitable purposes was such that the bequest might never become effective in possession or enjoyment, there was no authority under the statute for a deduction of the amount, *or its ascertained value,* from the gross estate. (Italics ours.)

On April 9, 1928, this Court affirmed the judgment of the Court of Claims in the *Mitchell case,* under the title of *Humes et al.* v. *United States,* No. 376, October Term, 1927. It is clear, however, that this Court did not decide whether or not the *ascertained value* of a contingent bequest to charity may be deducted; it merely held that in that case there was no way of ascertaining the value of the charitable bequest. This Court said:

> One may guess, or gamble on, or even insure against, any future event. The Solicitor General tells us that Lloyds of London will insure against having twins. But the fundamental question in the case at bar, is not whether this contingent interest can be insured against or its value guessed at, but what construction shall be given to a statute. Did Congress in providing for the determination of the net estate taxable, intend that a deduction should be made for a contingency the actual value of which cannot be determined from any known data? Neither taxpayer, nor revenue officer—even if equipped with all the aid which the actuarial art can supply—could do more than guess at the value of this contingency. It is clear that Congress did not intend that a deduction should be made for a contingent gift of that character.

In our brief in this Court in the *Humes case* we indicated that we thought that there might be some doubt whether the Treasury Department is correct in its view that no deduction may be made for any bequest to charity, the ultimate enjoyment of which is contingent. We said (p. 11):

> • • • In providing by regulation that experience tables of mortality may be used to determine the present value of a bequest to charity in the form of a remainder after the expiration of a life estate the Treasury Department is not far from conceding that where the only contingency on which the be-

> quest to charity depends is the duration of the life of a known individual not only the value of the bequest to charity, but the question whether the charity will ever enjoy the bequest may be determined through the use of mortality tables.

Nothing has occurred which has caused us to doubt the correctness of this statement.

II

IT IS DOUBTFUL WHETHER THE VALUE OF THE CHARITABLE BEQUESTS HERE INVOLVED WAS PROVABLE AT THE DATE OF DEATH OF THE TESTATOR

If the Treasury Department is not correct in its view that no deduction may be made for any bequest to charity the ultimate enjoyment of which is contingent, the question arises whether the value of the bequests here involved was ascertainable. The Court of Claims, evidently regarding the date of the testator's death as the basic date upon which value must be ascertainable in order to permit deduction, said (R. 24–25):

> It is clear that what is given for charitable and religious purposes is the "balance" of the estate at the death of the life tenant, whatever that "balance" might be. The life tenant had not only the use of the personal property, but the right to dispose of the real estate at her discretion and to use as much of the principal as would enable her to live in the comfort described in the will.
>
> Without entering into a discussion of what limitations there were, if any, on ex-

penditure by the life tenant "to suitably maintain her in as much comfort as she now enjoys," it is evident that the failure of investments, the diminution of the income, the high cost of living, and the changing ideas of what constitutes comfort might well absorb a good part, and possibly all, of the principal sum and leave no balance for charity, and that a contingency permeates the gifts to charity which may prevent any of them from ever going into possession and enjoyment. The gifts for charitable and religious purposes, therefore, did not take effect upon the death of the testator or upon the happening of an event which would certainly occur, and consequently, within the meaning of the statute, could not be deducted from the gross estate. In this view of the case, the plaintiff is not entitled to recover.

It seems open to some doubt, upon the authorities, whether the discretion given to the wife in the present case "to use any additional sum from the principal of my estate that may be necessary to suitably maintain her in as much comfort as she now enjoys" was an absolute discretion rendering the value of the remainders to charities incapable of determination, or whether the courts could control the exercise of such discretion, thus rendering the amount which could properly be applied to the wife's use capable of estimation, and the value of the remainders capable of determination.

In *Kahn et al., Executors,* v. *Bowers, Collector,* 9 F. (2d) 1018, the Circuit Court of Appeals for the Second Circuit affirmed, without opinion, a decision of the District Court for the Southern District of New York. The opinion of the District Court is not reported, but is found in Vol. 5, American Federal Tax Reports, page 5888, and is as follows:

> No one can now say whether any portion of the estate of Solomon Kahn will ever vest in a charitable or other institution within the provisions of subdivision 3 of section 403(a) of the Revenue Act of 1918. To hold that such portion of the estate may, under certain conditions and contingencies, vest in such institutions would be a perversion of the intent and purpose of Congress in providing for the exemption now claimed. It would also furnish a means whereby estates might easily be put beyond the reach of the inheritance tax law. To my mind, Congress intended that the exemption should not apply in cases where there is no certainty of a charitable bequest or desire ever taking effect. The motion to dismiss the complaint is granted.

In that case a trust was created, the income of the trust estate to be applied to the maintenance and support of a designated beneficiary for life, with a provision authorizing the trustees to use so much of the principal as they saw fit to the support and maintenance of the beneficiary. The will contained a provision that the residue should go

to charity. The court held that because the trustees might use the entire estate for the life tenant it was not clear that the charity would ever receive anything, and refused the deduction.

In the case of *Herron* v. *Heiner* (24 F. (2d) 745) the United States District Court for the Western District of Pennsylvania, dealt with a will creating a trust which provided that part of the income should be applied by the trustees in such amounts as they might deem proper to the maintenance and support of two persons who were then incurably insane, and the rest of the income to be applied to charity. The Commissioner of Internal Revenue had held that because of the wide discretion of the trustees as to the expenditure of income for the insane beneficiaries it could not be determined what the charities would receive, and the value was not ascertainable, but the court found what was reasonably necessary to maintain the insane persons and that the remainder would go to charity, and valued it and allowed the deduction.

In *First National Bank of Birmingham* v. *Snead* (24 F. (2d) 186) the Circuit Court of Appeals for the Fifth Circuit dealt with a will creating a trust the income of which was to be paid to the testator's widow, with authority to the trustees to make payments to her out of the principal to the extent they might deem it necessary for the proper support and comfort of the widow. The residue was given to charity. It was claimed there by the

Collector of Internal Revenue that the value of the bequest to charity could not be ascertained, and whether it would receive anything depended upon the contingency that the principal was not expended for the widow, but the court held that the trustees would be presumed to act reasonably and not arbitrarily, and that the amount which could properly be applied for the widow's use, depending upon her station and habits of life, could be estimated and the value of the bequest to charity thus determined and deducted.

The present case may perhaps be distinguished from *Herron* v. *Heiner* and *First National Bank of Birmingham* v. *Snead* on the ground that in the present case the discretion with respect to the use of the principal was vested in the beneficiary herself and not in trustees.

III

THE DEATH OF THE LIFE TENANT BEFORE ASSESSMENT OR PAYMENT OF THE TAX PERMITS VALUATION OF THE CONTINGENT REMAINDERS TO CHARITIES AND MAY ALLOW THEIR DEDUCTION

It will be noted that the testator died on June 15, 1921; his widow, the life tenant, died on December 12, 1921; and on June 14, 1922, the executor of the testator made an estate tax return and paid the tax shown to be due.

In *Boston Safe Deposit & Trust Co.* v. *Nichols* (18 F. (2d) 660) and *Union Trust Co.* v. *Heiner*

(19 F. (2d) 362) it has been held that where a life tenant dies prior to the assessment and payment of the tax the value of remainders should be determined upon the basis of the actual value of the life estate, not its theoretical value at the date of the testator's death calculated by the use of mortality tables. See also *Herold* v. *Kahn* (159 Fed. 608, decided under the War Revenue Act of 1898. This rule seems to be logical. When the time arrives for assessment and payment of the tax the best information then available should be used. There may be some question whether additional facts occurring after payment but before final audit may be resorted to, but no such question is here involved, for in this case the life tenant died before a return was due or filed, and before the tax was due or paid.

It would seem, therefore, that in this case the value of the bequests to charities was properly established by the death of the life tenant if not at the time of the decedent's death. The view of the Treasury Department discussed under Point I of this brief, however, does not depend upon the difficulty of proving the value of contingent bequests to charities, because it refuses to permit such value to be deducted even when proven by reference to mortality tables, which in other instances are regarded as adequate proof of value. The view of the Treasury Department must rest, therefore, upon the theory that a contingent bequest to a

charity is intrinsically not the kind of a bequest which Congress intended to be deductible. It would seem that the subsequent death of a life tenant can not change the intrinsic nature of a contingent bequest, and that we are therefore faced with the question whether the view of the Treasury Department is sound as applied to *all* contingent bequests.

However, it seems only fair to add that it may be that Article 56 of Regulations 37 does not go so far. The language of the Article is that (Italics ours):

> Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place *before the deduction can be allowed.*

If the italicized words refer to time, the death of a life tenant before a deduction is claimed is sufficient to permit the deduction. But it is more probable that the words are intended to mean "in order that the deduction can be allowed" and that the Treasury Department intended the date of death of the decedent to be the basic date for determining whether a bequest is contingent. At any rate, the Court of Claims seems to have taken this view.

CONCLUSION

The questions presented seem to be of some importance and likely to arise in other cases. Subse-

quent Revenue Acts contain provisions similar to those of Section 403 of the Revenue Act of 1918. Under these circumstances we do not feel justified in opposing a writ of certiorari.

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SEPTEMBER, 1928.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
The questions presented	2
The statute and regulations	2
Statement	6
Summary of argument	8
Argument:	
I. The use of the principal to maintain the widow was definitely limited by the will. Whether the known facts formed a sufficiently definite basis for the ascertainment of the amount of the bequests to charity is submitted for the decision of this court	10
II. There is a difference of opinion as to whether the value of the gift to charity is to be determined by facts known at the testator's death or in the light of events happening before the calculation of the tax	15
Appendix	20

CITATIONS

Cases:	
Boston Safe Deposit Co. v. *Nichols*, 18 F. (2d) 660	17, 18
Cochran v. *United States*, 254 U. S. 387	18
Dugan v. *Miles*, 292 Fed. 131	14
First National Bank of Birmingham v. *Snead*, 24 F. (2d) 186	9, 13
Henry v. *United States*, 251 U. S. 393	18
Herold v. *Kahn*, 159 Fed. 608	17
Herron v. *Heiner*, 24 F. (2d) 745	13
Hooper v. *Bradford*, 178 Mass. 95	16
Howe v. *Howe*, 179 Mass. 546	16, 17
Humes v. *United States*, 276 U. S. 487	14
Ithaca Trust Co., In re, 220 N. Y. 437	11
Kahn v. *Bowers*, 5 Amer. Fed. Tax Reps. 5888; 9 F. (2d) 1018	13
McCurdy v. *McCurdy*, 197 Mass. 248	16
Peck v. *Smith*, 227 N. Y. 226	11
Prewett v. *Land*, 36 Miss. 495	11

Cases—continued.	Page
Simpson v. *United States*, 252 U. S. 547	18
Smith v. *Field*, 98 N. J. Eq. 532	11
Stevens, In re Estate of Jared, 20 N. Y. Misc. Rep. 157	11
Stocker v. *Foster*, 178 Mass. 591	11
Union Trust Co. v. *Heiner*, 19 F. (2d) 362	17
United States v. *Parr's Executor*, 196 Fed. 996	17
United States v. *Fidelity Trust Co.*, 222 U. S. 158	18
White's Estate, In re, 208 N. Y. 64	16, 17
Statutes, etc.:	
Revenue Act of 1918, c. 18, sec. 403, 40 Stat. 1057, 1098	2–3
Treasury Regulations—	
No. 37 (approved August 8, 1919; 23 T. D., Int. Rev., p. 280, No. 3145)—	
Art. 20	5, 18
Art. 53	3–4
Art. 56	4
No. 63, art. 50, amending art. 56 of No. 37 (24 T. D., Int. Rev., p. 1036, No. 3384)	5, 18
No. 68, art. 47 (27 T. D., Int. Rev., p. 81, No. 3683)	5, 18
No. 70, art. 47 (28 T. D., Int. Rev., p. 427, No. 3918)	5
Gleason & Otis, Inheritance Taxation (1925), p. 505	18

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 267

ITHACA TRUST COMPANY, SOLE SURVIVING EXECUTOR and Trustee Under the Last Will and Testament of Edwin C. Stewart, Deceased, petitioner

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 22) is reported in 64 C. Cls. 686.

JURISDICTION

The judgment of the Court of Claims was entered February 20, 1928. (R. 25.) Motion for new trial was duly made April 18, 1928, and denied May 28, 1928. (R. 26.) Petition for certiorari was filed July 13, 1928. The jurisdiction of this Court rests on Section 3(b) of the Act of February 13, 1925.

THE QUESTIONS PRESENTED

The testator's residuary estate was given by his will to his wife for life, with a provision that she might have such additional sum from the principal as "may be necessary to suitably maintain her in as much comfort as she now enjoys." The remainder after the expiration of the life estate was given to certain charities. The testator died June 15, 1921, and his widow died December 12, 1921, before the estate tax was required to be determined and assessed.

The questions presented are:

First, whether the provision allowing the use of the principal to maintain the widow made the amount of the bequests to charity so uncertain and unascertainable as to prevent the deduction of the amount of the charitable bequests from the gross estate in determining the estate tax, and second, whether the value of the bequest of the remainder to charity was to be ascertained by use of tables of mortality, in the light of the conditions at the date of the testator's death, or to be determined by considering the fact of the death of the widow.

THE STATUTE AND REGULATIONS

The portions of Section 403 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1098) which are applicable are as follows:

> That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * *

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; * * *.

Articles 53 and 56, Regulations 37, approved August 8, 1919, relating to estate taxes under the Revenue Act of 1918, were as follows:

ART. 53. *Public, charitable, and similar bequests.*—Bequests to religious, charitable, scientific, literary, or educational corporations are deductible only if the corporation is organized or operated exclusively for one of the purposes specified (see Art. 54). Similarly, in the case of a trust, the trust must be exclusively for such purposes. It does not prevent deduction, however, that the property placed in trust is also subject to

another trust for a private purpose. Thus, where money or property is placed in trust to pay the income to an individual during life, and then to pay or deliver the same to a charitable corporation, or apply the principal to a charitable purpose, the charitable bequest or devise forms the basis for a deduction. The amount of the deduction, in such case, is the value, at the date of the decedent's death, of the remainder interest in the money or property which is devised or bequeathed to charity. For the manner of determining the value of such remainder interest, see Article 20. Gifts made in the decedent's lifetime are deductible only if made in contemplation of death, or intended to take effect at or after death, and the property is consequently included in the gross estate. Gifts made in satisfaction of a legacy are also deductible. The deduction is not limited in the case of the estates of residents to bequests to domestic corporations or to trustees for use within the United States.

ART. 56. *Conditional bequests.*—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed.

Article 20, Regulations 37, above referred to, provides for the valuation of annuities, life and remainder interests, according to mortality tables set up in the regulation.

Article 56 above quoted was subsequently amended by Article 50 of Regulations 63 under the Revenue Act of 1921 (24 Treas. Dec., Int. Rev., p. 1036, No. 3384) to read as follows:

> ART. 50. *Conditional bequests.*—Where the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.
>
> Where the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

The latter article was readopted as Article 47 of Regulations 68 under the Revenue Act of 1924 (27 Treas. Dec., Int. Rev., p. 81, No. 3683), and it was again readopted as Article 47 of Regulations 70 under the Revenue Act of 1926 (28 Treas. Dec., Int. Rev., p. 427, No. 3918).

STATEMENT

This action was brought in the Court of Claims to recover the amount of an estate tax alleged to have been erroneously and illegally assessed and collected. (R. 5.) The findings of fact (R. 19) disclose that on June 15, 1921, one Edwin C. Stewart, a resident of the State of New York, died testate (R. 19). His will is set forth at length in the record. (R. 14.) The 12th, 13th, and last provision of the will are as follows:

> Twelfth. I give unto my beloved wife, Annie L. Stewart, of Ithaca, New York, the use for her natural life of all the rest, residue and remainder of my property, real, personal and mixed of which I may die seized, with full authority to sell and dispose of any real estate of which I may die seized, for such figures as she may, in her judgment, deem for the best interest of my estate. I also authorize my wife, Annie L. Stewart, to use any additional sum from the principal of my estate that may be necessary to suitably maintain her in as much comfort as she now enjoys. I request my wife, Annie L. Stewart, from the said income of my estate, to give annually a sum sufficient in her judgment for the maintenance of my cousin, Grace L. Ely, of West Allenhurst, New Jersey.
>
> Thirteenth. At the death of my wife, Annie L. Stewart, of Ithaca, New York, from the balance of my estate, I direct my Executors, hereinafter named, to pay unto

the trustees of East Lawn Cemetery, the sum of Ten Thousand Dollars ($10,000).

* * * * *

Lastly, I hereby appoint my wife, Annie L. Stewart of Ithaca, New York, and the Ithaca Trust Company of Ithaca, New York, Executors of this my last Will and Testament; and hereby appoint the Ithaca Trust Company, of Ithaca, New York, to be Trustee of each and every Trust created in this Will for which a Trustee is not hereinbefore named.

The will was duly admitted to probate and letters testamentary issued to the widow and to this petitioner.

The widow was born May 27, 1860 (R. 20), and she died December 12, 1921, before the estate tax was required to be or was computed, ascertained or determined. The Court of Claims found (R. 21):

For many years prior to the death of said Edwin C. Stewart, he and his widow, Annie L. Stewart, lived in Ithaca, New York, in a simple and unpretentious style, spending each year less than the income produced by the estate of the said testator; and the income from the estate of said testator was, at his death, and during the life of the widow, in excess of the sum necessary to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of said testator. After the payment of debts and the specific legacies, the estate produced an income in excess of the sum necessary, in

> the absence of unusual circumstances, to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of the said testator.

It found that the value of the residuary estate at the date of the testator's death was $347,244.51, and that the value of the widow's life estate at the date of the death of her husband, computed according to the mortality tables prescribed by the Treasury regulations, was $126,329.64.

The petitioner's claim was based on the theory that the value of the widow's life estate was to be determined as of the date of the testator's death by the use of mortality tables, and not determined in the light of her death in December, before the tax was required to be computed. (R. 12.)

The Court of Claims denied recovery on the ground that, because of the provision allowing the widow to use the principal, the amount of the ultimate bequest to charity was too uncertain to enable its value to be ascertained and deducted from the gross estate.

SUMMARY OF ARGUMENT

I. This cause is brought here for settlement of the law because of conflict of decisions and because regulations of the Treasury Department are involved.

The first matter for consideration is the proper construction of the will. The will, properly construed, placed the residuary estate in the hands of the executrix and the executor, in trust during the

widow's life. Such discretion as existed in determining the necessity for drawing on the principal was given not alone to the widow, but to the executor acting with her. The widow did not have the unrestrained use of the principal but was limited to such use as was necessary to maintain her in her accustomed standard of living. Beyond that she could not go, and these restraints were enforceable in the courts. The findings of fact as to the widow's standard of living and as to the amount of the income took the amount of the residuary bequest out of the field of mere speculation and afforded a reasonable basis for determining its value and amount. On this point our views differ with the Court of Claims and with those of the Bureau of Internal Revenue, as disclosed by its regulations, and accord with those of the United States Circuit Court of Appeals in *First National Bank of Birmingham* v. *Snead*, 24 F. (2d) 186.

II. On the question whether the facts known at the date of the testator's death form the sole basis for computing the value of the life estate, or whether the value of the widow's life estate may be computed in the light of her death, occurring shortly after the testator's death and before the computation of the estate tax, the decisions are not in accord. The petitioner, in its claim for refund and in its petition in the Court of Claims, proceeded on the theory that the value of the widow's life estate was to be determined by mortality tables and not in the light of her early death;

but if, on the facts disclosed, the petitioner is entitled to greater relief than that asked for, there is no reason why the United States should oppose it.

ARGUMENT

I

THE USE OF THE PRINCIPAL TO MAINTAIN THE WIDOW WAS DEFINITELY LIMITED BY THE WILL. WHETHER THE KNOWN FACTS FORMED A SUFFICIENTLY DEFINITE BASIS FOR THE ASCERTAINMENT OF THE AMOUNT OF THE BEQUESTS TO CHARITY IS SUBMITTED FOR THE DECISION OF THIS COURT

At the outset it is necessary to construe the will. If the widow was given an unrestrained right to use the principal in her discretion, the amount of the bequests to charity would be entirely speculative. On the other hand, if the will restrains the widow's use of the principal by any definite formula, so that the formula applied to the disclosed facts affords a reasonable basis for defining the value of the amount of the charitable bequests, a different question arises.

The will is somewhat crudely drawn. The provision giving the widow the power to sell the real estate does not affect the case, as under that she was required to use a reasonable discretion in exacting an adequate price, and the proceeds became substituted for the original property as part of the estate. While somewhat indefinite, no doubt the will means that the residue of the estate was to remain in the

hands of the executrix and executor during the widow's life. The provision in Paragraph Thirteenth that after the widow's death the executor should pay money to trustees shows this to be so. (See *Smith* v. *Field*, 98 N. J. Equity, 532.) Even if the will had contemplated that the entire possession and control of the personal property should be left with the widow during her life, only a life estate would have been created and not an absolute power of disposition. *Peck* v. *Smith*, 227 N. Y. 228; *In re Ithaca Trust Co.*, 220 N. Y. 437. Paragraph Twelfth of the will did not allow the widow to use such part of the principal as *she* might deem necessary. It allowed the use of such amounts as " may be necessary." With the property in the joint control of herself and her coexecutor, her use was clearly restrained. Whatever limit of judgment and discretion was allowed, was vested not in the widow alone, but in the executrix and executor, acting together. No large discretion was allowed. The use of only such amounts as might be "necessary to suitably maintain her in as much comfort as she now enjoys" was permitted. That provision imposed a definite restraint on the use of the principal. Even where words indicating a vesting of discretion as to the facts have been used by a testator, the restraint is definite and enforceable by the remainderman in the courts. *Smith* v. *Field, supra; Stocker* v. *Foster*, 178 Mass. 591; *Prewett* v. *Land*, 36 Miss. 495; *In re Estate of Jared Stevens*, 20 N. Y. Misc. Repts. 157.

With the will thus construed, the question arises whether there was any definite basis for a finding as to the probable value of the bequests to charity, in the light of facts known at the date of the testator's death.

Article 56 of Regulations 37, in force at the time this case arose, provides that "where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed." Literally construed and applied to its limit, the regulation forbade the deduction in this case because there was the possibility that a substantial part, if not all, of the principal might be absorbed in maintaining the widow. The Court of Claims has so held, and the arguments in support of its view are fully set forth in its opinion. We are compelled to admit that we are not in accord with the views expressed in its decision or the construction placed upon the regulation by the Bureau of Internal Revenue.

The findings show that the widow was 61 years of age when her husband died. She and her husband had for a long time found the income of this estate more than sufficient for their joint support. Her style of living had become fixed, and at her age was not likely to become changed. In any event, she was limited by the will to the degree of comfort and standard of living to which she had been accustomed. Only shrinkage in value of the investments and diminution of earned income from

such causes would have made it necessary to use any portion of the principal.

If there had been no authority for use of the principal, according to established practice of the Treasury Department and its regulations, mortality tables could have been used as the method of ascertaining the value of the life estate and remainder. It is obvious that the mortality tables are based on the experience of a large number of lives and represent the average, and do not establish, in an individual case, the expectancy of a single person. As a practical matter, there are more uncertainties as to the real value of a bequest to charity in an individual case when determined by mortality tables than there was in this case as to the extent to which the power to use the principal might operate to diminish the charitable bequest. This point of view is supported by the decisions in *Herron* v. *Heiner* (United States District Court for the Western District of Pennsylvania), 24 F. (2d) 745, and *First National Bank of Birmingham* v. *Snead* (Circuit Court of Appeals for the Fifth Circuit), 24 F. (2d) 186. On the other hand, in *Kahn et al., Exr's.*, v. *Bowers, Collector*, 9 F. (2d) 1018, the Circuit Court of Appeals for the Second Circuit affirmed, without opinion, a decision of the District Court for the Southern District of New York. That was a case where the income of a trust estate was to be applied to the maintenance of a designated beneficiary for life, with a provision authorizing the trustees to use

so much of the principal as they saw fit for the benefit of the beneficiary. The will contained a provision that the residue should go to charity. The District Court held that it was not clear that the charity would ever receive anything and refused the deduction. This opinion is not reported but is contained in Vol. 5, American Federal Tax Reports, page 5888, as follows:

> No one can now say whether any portion of the estate of Solomon Kahn will ever vest in a charitable or other institution within the provisions of subdivision 3 of section 403(a) of the Revenue Act of 1918. To hold that such portion of the estate as may, under certain conditions and contingencies, vest in such institutions would be a perversion of the intent and purpose of Congress in providing for the exemption now claimed. It would also furnish a means whereby estates might easily be put beyond the reach of the inheritance tax law. To my mind, Congress intended that the exemption should not apply in cases where there is no certainty of a charitable bequest or devise ever taking effect. The motion to dismiss the complaint is granted.

That case may be distinguished from this because of the wide discretion given the trustee.

See also *Dugan, Executor of O'Neill,* v. *Miles,* 292 Fed. 131.

The case of ***Humes*** v. ***United States,*** 276 U. S. 487, bears only indirectly on this case, in that the contingencies were such that there was no basis,

through the use of mortality tables or any other reasonable method, for ascertaining the value of the bequest to charity.

Of course, possibility of losses to the trust estate, through misfortune or bad investments, exists in the case of any trust with a life estate and remainder, and the presence of such elements of uncertainty in this case does not distinguish it from the ordinary case of life estate and remainder, the value of which is determined by the use of mortality tables.

The regulations on this subject have been in effect for some years, and no doubt have been applied to a considerable number of cases; and the fact that Congress has reenacted the statute with the regulations in force is a consideration which must be borne in mind before the position of the Bureau of Internal Revenue is rejected.

The appendix contains all the recorded rulings of the Bureau.

II

THERE IS A DIFFERENCE OF OPINION AS TO WHETHER THE VALUE OF THE GIFT TO CHARITY IS TO BE DETERMINED BY FACTS KNOWN AT THE TESTATOR'S DEATH OR IN THE LIGHT OF EVENTS HAPPENING BEFORE THE CALCULATION OF THE TAX

In this case the testator died in June, 1921, and the widow in December of that year. The tax was not required to be ascertained or calculated or returned until 1922. Laying aside the element of the case discussed in subdivision I of this brief, the

question arises whether the value of the widow's life estate should be computed with eyes shut to the fact of her early death and by the use of mortality tables as of the date of the testator's death.

The petitioner proceeded on the theory that this method is the right one and mortality tables are to be used (R. 12), and the only relief sought in the Court of Claims was on that basis. However, the facts in the record raise the point, and we know of no proper ground to object to the consideration of the question or the granting of such relief to the petitioner as the record discloses it is entitled to.

The rights of the parties in regard to the payment of a tax of this kind are ordinarily to be determined as of the time of the decedent's death.

Howe v. *Howe*, 179 Mass. 546.
McCurdy v. *McCurdy*, 197 Mass. 248.
Hooper v. *Bradford*, 178 Mass. 95.
In re White's Estate, 208 N. Y. 64.

For Federal estate tax purposes the value of the gross estate of the decedent should be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. (Section 402.) The value of life estates in cases like this can not be readjusted from time to time in the light of subsequent events. There is clearly no basis for readjustment after the time fixed by law for the calculation, return and assessment of the tax, for if such a practice were to be followed these cases would never be closed. The contention of the petitioner is that if events happen between the date of

the testator's death and the date fixed for the ascertainment and computation of the tax which throw additional light on the values to be determined, such events may be taken into account. The value of the property involved must, of course, be determined as of the date of the testator's death. The value of the life estate or remainder interest as of the date of the testator's death was not changed by subsequent events. To support the petitioner's position, the following cases are cited:

Boston Safe Deposit Co. v. *Nichols*, 18 F. (2d) 660.
Union Trust Co. v. *Heiner*, 19 F. (2d) 362.
Herold v. *Kahn*, 159 Fed. 608.

No appeal was taken by the Department of Justice from the decision in the *Boston Safe Deposit Co. case*.

To the contrary see—

Howe v. *Howe*, 179 Mass. 546.
In re White's Estate, 208 N. Y. 64.
United States v. *Farr's Executor*, 196 Fed. 996 (District Court, Eastern District of Pennsylvania).

The cases last cited seem to support the conclusion that the value of the life estate is to be determined by the use of mortality tables in the light of facts known at the date of the testator's death, and not in the light of subsequent events occurring before the calculation of the tax. It is true that in both Massachusetts and New York the taxing stat-

utes expressly authorize the use of mortality tables, but so do the estate tax regulations of the Treasury Department. (See Regulations 37, Article 20, 23 T. D., Internal Revenue, No. 3145, p. 280; Regulations 63, Article 15, 24 T. D., Internal Revenue, No. 3384, p. 1036; Regulations 68, Article 13, 27 T. D., Internal Revenue, No. 3683, p. 81; Regulations 70, Article 13, 2 T. D., Internal Revenue, No. 3918, p. 427.)

See—

Simpson v. *United States*, 252 U. S. 547.
Cochran v. *United States*, 254 U. S. 387.
Henry v. *United States*, 251 U. S. 393.
United States v. *Fidelity Trust Co.*, 222 U. S. 158.

In Gleason & Otis, Inheritance Taxation (1925), it is said, at page 505:

> Though it might seem an injustice to tax the theoretical value of a life estate of a woman of thirty, whose expectation of life is thirty-five years and whose interest in the fund is about three-fourths its entire amount at full value when she actually survives the testator only a few hours, *the logic that a time must be fixed for valuation and that time is the death of the testator is immutable and has thus far been uniformly sustained.* (Italics ours.)

In *Boston Safe Deposit Co.* v. *Nichols*, 18 F. (2d) 660, it was pointed out that the question in a case like this is as to the amount of the *net* estate and as to the amount of the deductions to be made

from the gross estate, and that many of the deductible items are not ascertainable until after the testator's death and in the light of occurrences during administration, and for that reason it justifies the use of information developed subsequent to the testator's death in the calculation of the deductible value of remainders to charity.

In this brief and the petitioner's, and the decision below and those cited, there is presented all the available material on these two problems.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

FEBRUARY, 1929.

APPENDIX

Solicitor's Memorandum No. 1135

ESTATE TAX—TITLE IV, REVENUE ACT OF 1918

Charitable gift dependent upon contingency.—Where a gift to charity is dependent upon a contingency which makes it impossible to determine the value of the gift at the time of the death, no deduction can be made from the value of the gross estate. (Revenue Act of 1918, Sec. 403(a)(3).) Deduction refused where the gift to charity was subject to a trust, to last during the life of the survivor of two daughters and three grandchildren, and twenty-one years longer, and during the trust period the trustee was directed to apply the income to the use of specified individuals, and also empowered, at discretion, to apply the principal to the same purpose.

August 22, 1919.

Deputy Commissioner Hagerman:

Opinion is requested as to whether a gift made to "The Cleveland Foundation" is deductible in ascertaining the value of the net estate of Charles W. Wason.

The decedent died, a resident of Ohio, on April 15, 1918. On October 7, 1914, the decedent executed a trust of certain property to The Cleveland Trust Company. The disposition was as follows:

The income, and such parts of the principal as the trustee might decide, were to be paid to the decedent

during his life. After his death certain specified payments were to be made to two daughters. In a certain contingency $50,000 was to be paid to Cornell University. Provision was made for certain annuities. The wife was next empowered to dispose of one-third of the property by will. The income from the remainder of the estate was given to the decedent's daughters during their life, any afterborn child taking a similar share. It was then provided:

> I also authorize and empower the Trustee to expend such part or all of the principal of the trust estate as in the judgment of the Trustee and according to its absolute discretion may be necessary to provide for the comfort, enjoyment, maintenance and support of my wife and of my children in case the income provided for them is insufficient therefor.

Upon the death of any child leaving issue, the income of the child's share was to be paid to such issue; and in case of the death of a child without issue, the income of his or her share was to go to the surviving children or their issue. The trust for the children and their issue was to continue for a period of twenty-one years after the death of the last survivor of his two daughters and three grandchildren. At the expiration of this period, or the extinction of all issue prior thereto, the trust property was to be devoted to the purposes of a certain charitable trust, known as "The Cleveland Foundation." By his will the decedent placed certain additional property in this trust.

The statute provides for the deduction of—

> The amount of all bequests, legacies, devises, or gifts, * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. (Revenue Act of 1918, Sec. 403 (a) (3).)

The deduction provided for is the "amount" of a bequest to charity; and this, in case of a remainder interest, means the *value* of such interest at the time of the death. (Law Opinion No. 874, July 9, 1919.) In the present case the prior estates are of such a character as to render it very difficult to determine the value of the remainder. In addition, an absolute discretion is vested in the trustee to apply the principal, as well as the income, to the use of private individuals. It is impossible to tell how this discretion will be exercised; and without knowledge on that point it is equally impossible to value the interest, if any, which goes to charity. Under these circumstances, no foundation is laid for a deduction.

The Regulations (No. 37 (Revised, 1919), Art. 38) provide:

> No deduction may be taken upon the basis of a vague or uncertain estimate. Where an uncertain or contingent liability, not allowed

as a deduction, becomes fixed, and payment is made, the remedy is a claim for a refund of the excess tax.

The principles stated apply to the present deduction. It may not now be allowed; but if the uncertainty as to the value of the charitable bequest is later removed an application for a refund would be proper.

It is held, therefore, that the bequest to The Cleveland Foundation made by the decedent is not now a subject for deduction in estimating the value of the net estate; but that an application for a refund may be made if the uncertainty as to the amount of the bequest is removed.

(Signed) ROBERT N. MILLER,
RDT: ACL. *Solicitor of Internal Revenue.*

SOL: C: JGK
188657

AUGUST 14, 1922.

In re *Arthur L. Howard, Executor of the Will of Zabdiel Adams Willard, Plaintiff*, v. *John F. Malley, Sometime Collector of Internal Revenue, Defendant; Arthur L. Howard, Executor of the Will of Zabdiel Adams Willard, Plaintiff*, v. *United States of America, Defendant.*

MR. SOLICITOR: The foregoing cases were argued on defendant's demurrers (general and special) to the complaint and petition before Hon. Julian Mack, District Judge, at Boston, Mass., August 11, 1922. At the close of the argument judgment was entered, without oral or written opinion, sustaining the demurrers.

The facts are briefly as follows:

The plaintiff's testator died March 15, 1918. Plaintiff qualified as executor April 17, 1918. The estate was administered promptly and the estate tax was paid by the executor in October, 1918, under the provisions of the Revenue Act of 1916 as amended. Decedent by his Will created a trust providing for the payment of the income of his estate to his sister, daughter and nurse, and after the death of the survivor of the life tenants the trust to continue for twenty-one years, during which period one half of the income was to be paid to five charitable corporations and the other half to be accumulated for the benefit of said five charitable

corporations. At the end of the trust period the entire corpus of the estate, with accumulations, was to be distributed pro rata among the five charitable corporations. Plaintiff's testator, however, inserted a provision in his will authorizing, empowering and directing the trustee or trustees thereunder for the time being to invade the principal for the purpose of providing for the comfort and welfare of the life tenants if at any time any exigency or emergency should arise which in the discretion of the trustee or trustees for the time being would necessitate or justify such invasion of the principal.

Under the 1916 Act as amended there was no exemption from taxation of bequests to charity. The Revenue Act of 1918, however, contained such an exemption and Section 403 (a) (3), establishing such exemption, provided that "this deduction shall be made in case of the estate of all decedents who have died since December 31, 1917."

After the enactment of the Revenue Act of 1918 plaintiff filed a claim for the refunding of the amount of the tax based upon the value of the gift to the five charities, which refund was denied, and plaintiff brought an action in assumpsit against Collector Malley and a suit against the United States under the Tucker Act to recover back the amount so paid.

To the foregoing actions the defendants filed special and general demurrers, assigning six grounds for demurrer. The only two grounds necessary to refer to here and the only grounds considered by the court go to the merits of the case and the action of the court in sustaining the demurrers settles the whole matter. The grounds of the general demur-

rers were that the complaint and petition stated no legal cause of action because:

1st. A gift to a trustee for the use of a charitable corporation, subject to be defeated by the exercise of a power and discretion vested in the trustee, is not exempt from taxation under section 403 (a) (3).

2d. A gift to a trustee for the use of a charitable corporation, but not exclusively for such use, is not exempt from taxation under Section 403 (a) (3) of the Revenue Act of 1918.

Judge Mack, correctly concluding that a decision of the questions of law raised by the foregoing grounds assigned in the general demurrers would dispose of the whole matter, declined to consider the other questions raised, but expressed himself as firmly of the opinion that the Bureau had correctly construed the law, that the plaintiff was not entitled to recover back the taxes paid, and that the demurrers would be sustained.

These cases are of importance. They are cases of first impression and it is understood that there are several similar cases pending in the Bureau which have not yet reached the stage of litigation. The judgment of the court in sustaining the demurrers approves the construction of the statute contained in Article 56 of Regulations 37 as amended November 21, 1921, by T. D. 3241.

J. G. KORNER,
Acting Assistant Solicitor,
Civil Division.

S. M.—2946

SOL: I: II: JFG
A-203896

OFFICE OF THE SOLICITOR OF
INTERNAL REVENUE,
Dec. 30, 1924.

In re: Estate of James C. Patterson, District of Alabama. Date of death, January 19, 1923.

Mr. COMMISSIONER: This office has considered the protest of the executor of the above-named estate in so far as it is directed against the action of the Miscellaneous Tax Unit in proposing in its 30-day letter dated September 13, 1924, to disallow the deduction on account of charitable bequests.

The representative of this estate appeared before this office and presented oral arguments in favor of the estate's contention that the deduction should be allowed.

The facts under consideration are as follows: Decedent by his last will created a trust fund, under the terms of which the income of which was to be paid to his widow during her life, and by a further provision, arrangement was made whereby under certain circumstances the trustees were empowered to pay over to the widow such additional sums of the principal of the trust estate as to the trustees might seem necessary or desirable for such purposes. At the death of the widow the trust fund was to be divided among several charitable

institutions. The exact point involved here is covered by Article 50, Regulations 63, the second paragraph of which provides:

> Where the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

In the present case no part of the trust fund is exempt from the exercise of the power given the trustees to divert the principal. It follows, therefore, that the estate is not entitled to any deduction on account of the bequests to charitable organizations. It is the opinion of this office, therefore, that the action of the Unit is correct and should be sustained. Accordingly, it is recommended that the proposed 60-day letter hereto attached be approved.

(Signed) NELSON T. HARTSON,
Solicitor of Internal Revenue.

S. M.—3183

SOL: I: II: JFG
A–204639

OFFICE OF SOLICITOR,
INTERNAL REVENUE,
Feb. 13, 1925.

Estate of Peter Klein, District of 10th Ohio. Date of death, August 13, 1922.

Mr. COMMISSIONER. This office has considered the protest filed by the representative of the above-named estate against the disallowance of the deduction claimed on account of charitable, public and similar bequests. No hearing was requested before this office within the time provided therefor.

The facts are as follows: The decedent provided by will that his wife should receive the entire income from his estate during her life. Upon her death, the executors were directed to pay all debts and funeral expenses of the widow before provision was made for the payment of residuary legacies, a part of which were the legacies to charitable organizations.

Since it is impossible to ascertain, until the death of the wife, the amount of her debts and the funeral expenses, it is seen that the amount claimed as a deduction is subject to be diverted to a noncharitable purpose, and in view of the express provisions of Regulations 63, since the amount of the deduction can not be presently ascertained, no deduction can be allowed.

It is the opinion of this office, therefore, that the action of the Unit is correct, and it is accordingly recommended that the 60-day letter hereto attached be approved.

(Signed) NELSON T. HARTSON,
Solicitor of Internal Revenue.

Enclosure 11020.

S. M.—4359

SOL: I: II: JFG
A-205171

SEPTEMBER 17, 1925.

Deputy Commissioner ESTES:

Reference is made to your memorandum dated January 9, 1925 (MT–ET–1035–LSP), in connection with the estate tax on the estate of Frank A. Ruf, District of 1st Missouri. A hearing was held in this office at which the estate was represented by its attorneys.

The decedent, Frank A. Ruf, died May 28, 1923, a resident of Missouri. In his will decedent made provision for certain bequests and then provided that all the rest, residue and remainder of the estate should go to a trustee named, and after making provisions giving the trustee power to manage and control the trust estate, the decedent made the following provision in his will:

> I direct my Trustee, beginning on the fifteenth day of the second month following my death, to pay over unto my wife, Alpha H. Ruf, all of the net income and revenue derived from said trust estate, or, if need be, such part of the corpus thereof as may be necessary for the comfort, maintenance and support of my wife, during her life. A request, in writing, to my Trustee, made by my wife, stating that the sum requested by

> her is needed for her comfort, maintenance and support, shall be authority to my Trustee to pay unto her any sum so requested, out of the corpus; or, in the event of her incapacity, then my Trustee may, in its discretion, use so much of the corpus as may be necessary for her comfort, maintenance and support.

Provision is then made on the death of the wife for the payment over of the entire residue to certain charitable organizations.

It is the contention of the estate that since the income of the estate has been sufficient for the comfort, maintenance and support of the widow, and that since in all probability the entire income of the estate will not be used by her for that purpose, that the estate should be entitled to deduction on account of charitable bequests in the amount of the remainder value of the entire residue of the trust fund after the death of the widow.

Article 47, Regulations 68, provides:

> Where the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

In the present case no part of the trust fund is exempt from the exercise of the power given to divert the principal. It follows, therefore, that under the regulations as quoted above and in view

of the decision of the District Court in the case of Howard vs. Malley concerning a similar deduction claimed in connection with the estate tax on the Willard estate, it is the opinion of this office that the estate is not entitled to any deduction on account of the bequest of the residue to charitable corporations. It is accordingly recommended that the 60-day letter be prepared by your office in accordance with this opinion.

In view of the fact that the only point upon which it appears your office and the representative of the estate had not agreed has been passed on by this office, and since the attorney for the estate has appeared before this office at a hearing in connection with that point, it will not be necessary to notify the representatives of the estate of the transmission of the files to this office.

The 60-day letter, when prepared, should be forwarded through this office for approval.

(Signed) A. W. GREGG,
Solicitor of Internal Revenue.

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SUPREME COURT OF THE UNITED STATES.

No. 267.—October Term, 1928.

Ithaca Trust Company, Executor and Trustee under the will of Edwin C. Stewart, Petitioner, *vs.* The United States. | On Writ of Certiorari to the Court of Claims.

[April 8, 1929.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover the amount of taxes alleged to have been illegally collected under the Revenue Act of 1918, February 24, 1919, c. 18; 40 Stat. 1057, in view of the deductions allowed by § 403 (a) (3), 40 Stat. 1098. The Court of Claims denied the claim, 64 C. Cls. 686, and a writ of certiorari was granted by this Court.

On June 15, 1921, Edwin C. Stewart died, appointing his wife and the Ithaca Trust Company executors and the Ithaca Trust Company trustee of the trusts created by his will. He gave the residue of his estate to his wife for life with authority to use from the principal any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys." After the death of the wife there were bequests in trust for admitted charities. The case presents two questions the first of which is whether the provision for the maintenance of the wife made the gifts to charity so uncertain that the deduction of the amount of those gifts from the gross estate under § 403 (a) (3), *supra*, in order to ascertain the estate tax, cannot be allowed. *Humes* v. *United States*, 276 U. S. 487, 494. This we are of opinion must be answered in the negative. The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator and even after debts and specific legacies had been paid was more than sufficient

to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs.

The second question is raised by the accident of the widow having died within the year granted by the statute, § 404, and regulations, for filing the return showing the deductions allowed by § 403, the value of the net estate and the tax paid or payable thereon. By § 403 (a) (3) the net estate taxed is ascertained by deducting among other things gifts to charity such as were made in this case. But as those gifts were subject to the life estate of the widow of course their value was diminished by the postponement that would last while the widow lived. The question is whether the amount of the diminution, that is, the length of the postponement, is to be determined by the event as it turned out, of the widow's death within six months, or by mortality tables showing the probabilities as they stood on the day when the testator died. The first impression is that it is absurd to resort to statistical probabilities when you know the fact. But this is due to inaccurate thinking. The estate so far as may be is settled as of the date of the testator's death. See *Hooper* v. *Bradford*, 178 Mass. 95, 97. The tax is on the act of the testator not on the receipt of property by the legatees. *Young Men's Christian Association* v. *Davis*, 264 U. S. 47, 50; *Knowlton* v. *Moore*, 178 U. S. 41, 49, and *passim*; *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 348, 349; *Edwards* v. *Slocum*, 264 U. S. 61. Therefore the value of the thing to be taxed must be estimated as of the time when the act is done. But the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market. See *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 222. Like all values, as the word is used by the law, it depends largely on more or less certain prophecies of the future, and the value is no less real at that time if later the prophecy turns out false than when it comes out true. See *Lewellyn* v. *Electric Reduction Co.*, 275 U. S. 243, 247. *New York* v. *Sage*, 239 U. S. 57, 61. Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done, but that the value of the wife's life interest must be estimated by the mortuary tables. Our opinion is not changed by the necessary exceptions to the general rule specifically made by the Act.

Judgment reversed.